86-778

Supreme Court, U.S.
FILED
OCT 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHARLENE McCOLLUM, TONY D. McCOLLUM, and
TIMOTHY D. McCOLLUM,

Petitioners,

v.

WILLIAM F. BOLGER, Postmaster General,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Did the District Court and Court of Appeals err in determining that personal animosity between the supervisor and complaining employees and members of the complaining applicant's family is a legitimate nondiscriminatory reason for employment discrimination so as to rebut Petitioners' prima facie case of sex discrimination?

Did the District Court and Court of Appeals err in determining that Petitioner, Tony McCollum, did not prove a prima facie case of sex discrimination and retaliation?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Petitioners, Charlene McCollum, Tony McCollum, and Timothy McCollum, Plaintiffs below, and William F. Bolger, George T. Howard, the United States Postal Service and the National Rural Letter Carriers Association, Defendants below.

NOTICE OF BELIEF THAT PARTY BELOW LACKS INTEREST IN THE OUTCOME

Pursuant to rule 19.6 of the Rules of the Supreme Court of the United States, notice is hereby given that petitioners believe that the United States Postal Service, George T. Howard and the National Rural Letter Carriers Association, defendants below, have no interest in the outcome of this petition. Petitioners have not sought herein review of the judgments below in favor of these parties. Only petitioners' Title VII claims against the Postmaster General in his official capacity are the subject of this Petition.

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Respondent.

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FOR THE ELEVENTH CIRCUIT

Charlene McCollum, Tony McCollum and Timothy McCollum hereby petition that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 23, 1986.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 23, 1986 (Nos. 85-8680, 85-8681 and 85-8682). The opinion, which is contained in the Appendix at page 1, is reported at 794 F.2d 602 (11th Cir.1986). The opinion of the United States District Court for the Northern District of Georgia, which is not reported, is contained in the Appendix at page 17. The judgment of the United States Court of Appeals is contained in the Appendix at page 86.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 23, 1986 affirming judgment against petitioners entered by the United States District Court for the Northern District of Georgia on July 26, 1985.

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATONS INVOLVED

Section 2000e-16(c) of 42 U.S.C. provides:

'Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination

based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, executive order 11478 or any succeeding executive orders, or after 180 days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

STATEMENT OF THE CASE

A. Course of Proceedings in the Courts Below

Petitioners' cases against the Postmaster General, the Postal Service and Postmaster George T. Howard arise out of discrimination complaints filed with the Postal Service in 1981. Charlene McCollum, a rural carrier employed at the Rome, Georgia Post Office, filed two sex discrimination complaints because of the reduction of her rural route, and consequently of her salary, and because of her removal from employment. (Record on Appeal, Vol. 1, pp. 1-4). By means of a union grievance procedure, the termination was later converted to a 78-day suspension. R1-1-3, 34. When the discrimination complaints had been pending for over 180 days without a final decision by the Postal Service, Charlene McCollum filed suit in the United States District Court for the Northern District of Georgia on April 6, 1983. R1-1-1, 4.

Petitioner Tony McCollum, son of Charlene McCollum and also a rural carrier at the Rome Post Office, filed a discrimination complaint in 1981 based on sex discrimination and reprisal. R4-1-1, 3. The

incidents complained of were improper reduction of Mr. McCollum's work week, assignment of an off day so as to deny Mr. McCollum a normal two-day weekend and issuance to Mr. McCollum of a warning letter for failure to follow instructions. R4-1-2, 3. On June 3, 1983, an administrative decision unfavorable to petitioner was issued by the Postal Service and, on July 1, 1983, he filed suit in the United States District Court for the Northern District of Georgia. R4-1-1, 3.

Petitioner Timothy McCollum, another son of Charlene McCollum, took and passed an examination for employment with the Postal Service in 1979. R8-1-1. In 1981, Timothy McCollum learned that the Postmaster in Rome had passed over him for employment and selected a female applicant who was less qualified than he for a position in the Rome Post Office. R8-1-2. Mr. McCollum then filed a sex discrimination complaint, which complaint was rejected by the Postal Service. R8-1-2. Mr. McCollum then filed suit in the United States District Court for the Northern District of Georgia on March 25, 1982. R8-1-1. That Court remanded the case to the Postal Service with directions to accept and investigate the complaint. R8-10. After the administrative complaint had been pending before the Postal Service for over six months after the remand, the case was reinstated in the District Court. R9-17.

The complaint of Charlene McCollum against Postmaster George T. Howard individually was dismissed by the District Court on March 26, 1984. R2-26. The complaint of Tony McCollum against the Postal Service was dismissed by the District Court on December 30, 1983 for lack of subject matter jurisdiction. R4-11.

The case of Charlene and Tony McCollum against the National Rural Letter Carriers Association was based on failure to represent them in various disagreements with Postal Service management, a failure which petitioners contended was due to union officials' hostility toward petitioners. R1-1-5, 4; R4-9-2.

The cases of all three petitioners were consolidated and tried by the United States District Court for the Northern District of Georgia in May, 1985. On July 26, 1985, that Court entered its decision in

favor of appellees. R3-40. Notices of Appeal were filed by all three petitioners on August 22, 1985. R3-42,7-44,9-28.

The United States Court of Appeals for the Eleventh Circuit entered judgment affirming the judgment of the United States District Court on July 23, 1986. Only petitioners' Title VII claims against the Postmaster General in his official capacity are the subject of this petition.

B. Statement of Facts

For a number of years there has been evident hostility between Charlene McCollum and George T. Howard, the Postmaster in Rome. Mrs. McCollum traces the beginning of this hostility to a 1976 incident involving the filling of an auxiliary rural route. According to the National Agreement then in effect between the Postal Service and the National Rural Letter Carriers Association, the position was to be given to the senior substitute rural letter carrier, at that time Charlene McCollum. Mrs. McCollum contended that Mr. Howard wanted to give the route to another and younger female and that bad feelings began when he was required by the National Agreement to give the route to Charlene McCollum. R3-40-13.

The Postmaster dates the beginning of the hostility between himself and Charlene McCollum to his refusal to hire Timothy McCollum and Vickie Dorsey, children of Charlene McCollum. R3-40-12. The evidence in this case shows numerous confrontations between Charlene McCollum and the Postmaster, culminating in the 1981 incidents giving rise to her discrimination complaints. R3-40-15, 18, 21, 24.

One of Charlene McCollum's two discrimination complaints was filed because of a reduction in her rural route with a consequent reduction in pay. After the route reduction, her pay was less than that of four male rural carriers, including one whose route was evaluated and reduced at the same time

as Charlene McCollum's evaluation and reduction. Appendix p. 9. The pay of the carriers involved should have been based on length of route and box factor, a figure based on the volume of mail and number of boxes served. R3-40-22. The box factor and mileage of Mrs. McCollum's route was greater than that of the four male rural carriers. Appendix 9.

Charlene McCollum's second discrimination complaint was based on her removal from Postal Service employment for alleged insubordination and failure to follow instructions. R3-40-24. After a grievance filed by the National Rural Letter Carriers Association, the removal was converted to a 78-day suspension. R3-40-30. The evidence before the District Court indicated that Mrs. McCollum was treated more harshly than similarly situated male employees at the Rome Post Office. Appendix 11.

The Court of Appeals concluded that Mrs. McCollum established a prima facie case of sex discrimination on both her complaints. Appendix 11. That Court also concluded that the respondent rebutted the prima facie case. With regard to the suspension, the rebuttal was by showing that her suspension was based in part on the fact that she had a bad relationship with her supervisor and did not get along with him. Appendix 11.

Beginning in March 1981 and extending for several months thereafter, Tony McCollum represented his mother in her discrimination complaints. R3-40-50. Tony McCollum met with the Postal Service EEO counselor about his mother's complaints on March 25, April 9 and April 20, 1981. The counselor met with Mr. Howard regarding the complaints sometime between March 25 and April 9 and again on May 4, 1981. R3-40-50. Mr. Howard testified that he did not know Tony McCollum was representing his mother but that he would not have been surprised to learn such. R3-40-50.

Tony McCollum's discrimination complaints arose out of a situation which occurred while he was temporarily carrying his mother's route during her suspension. For the first few weeks, he carried the route six days per week, earning overtime pay for the sixth day each

week. In May 1981, the Postmaster reduced Tony McCollum's work week to five days by assigning him a substitute on Wednesdays. R3-40-44.

A female rural carrier, Dorothy Hubbard, served a vacant route in 1979-80 for approximately eight months without a substitute except for a two or three day period when she was sick. Another female carrier, Faye Evans, served a vacant route for five months, the first three and one-half without a substitute. When she did receive a substitute, it was at her own request and was on Saturdays. When a third female carrier was assigned a substitute, it was also for Saturdays. R3-40-48, 49.

The Postmaster stated that he had never chosen the off day for any substitute except Tony McCollum, that he usually lets carriers pick their own day but that he "just didn't have the time" to let Tony McCollum pick his off day. Mr. Howard also stated that he could have given Tony McCollum Monday off. R3-40-49.

Mr. McCollum filed a discrimination complaint about the assignment of a Wednesday substitute and also about the issuing to him of a letter of warning for reporting to work on the first day a substitute was scheduled to work. The grounds for the complaint were sex discrimination and reprisal for his assisting his mother in her discrimination complaints. R4-1,-2, 3.

Mr. McCollum testified that he was not told of the assignment of a substitute by Postal Service management but rather only by the assigned substitute. R3-40-45. He did receive a certified letter on the post office workroom floor which he refused and which was determined to have contained instructions about the assignment of a substitute. R3-40-44. Mr. McCollum subsequently appeared for work on the day a substitute was assigned to work and was given a letter of warning by the Postmaster for failing to follow instructions. R3-40-46, 47.

In 1979 Timothy McCollum, another son of Charlene McCollum, took and passed an examination for employment with the Postal Service and was placed on a register of persons eligible for employment

as substitute rural carriers at the Rome Post Office. On his application for employment, Timothy McCollum answered no to the question as to whether he had any relatives working for the federal government. At that time his father was Postmaster at Armuchee, Georgia and his mother and brother were employed as rural carriers at the Rome Post Office. He testified that he answered the question as he did because he was under the impression that, since the Postal Service had now become an independent agency, it was no longer part of the federal government. Vickie Dorsey, sister of Timothy McCollum, answered this question in the same manner. R3-40-62.

Mr. Howard notified both Timothy and Vickie that they were disqualified for employment because of falsification of application. R3-40-63. The evidence herein indicates that they were actually never disqualified or removed from the hiring register and that officials of the Atlanta Sectional Center and the Office of the Postmaster General did not consider it proper that they be disqualified. R3-40-63, 64. In addition, Timothy McCollum received a February 26, 1982 letter from the Atlanta Sectional Center informing him that the substitute rural carrier register that he was on was being consolidated with the regular rural carrier register and giving him the opportunity to remain on the new register. R3-40-64.

Prior to the July 1981 National Agreement change establishing RCR employees, substitutes were hired from hiring worksheets forwarded to the Postmasters by the Atlanta Sectional Center. Persons were listed on the worksheets in order of eligibility, and Postmasters were instructed to hire from the top of the list or have a good reason for not doing so. On at least one occasion in the past, Mr. Howard has hired from the top of a hiring worksheet. R3-40-65.

Timothy McCollum appeared in the Number 1 position on a January 12, 1981 worksheet sent to the Rome Post Office by the Atlanta Sectional Center. Mr. Howard testified that he sent a call-in notice to Mr. McCollum and that he did not respond. Mr. McCollum testified that he never received such a notice. The Postmaster further testified that he sent Timothy McCollum a call-in notice because the regulations required it, and he would not have hired him if he had re-

sponded. R3-40-65, 66.

There was also a Supplemental Register dated January 12, 1981 containing eight names. Again Timothy McCollum was ranked first. The Postmaster selected a female, Deborah Bohannon, ranked and listed eighth on that register. Mr. Howard testified as to why he passed over all the other names on the register and hired Ms. Bohannon, advancing what the District Court considered legitimate reasons for doing so. R3-40-66.

The last substitute rural carrier hired before Ms. Bohannon had been Faye Evans, a female, hired in early 1980. At that time, two females, Dot Hubbard and Chloe Dollar, who had been hired on an emergency basis rather than from a register, were working as substitute rural carriers, where they remained until becoming RCR employees after the July 1981 contract change. R3-40-66.

Mr. Howard testified as to several reasons for not hiring Timothy McCollum: falsification of application, impossible to work with or around, too many members of one family at one post office, failure to respond to call-in notice. Timothy McCollum testified that Mr. Howard's actions may have been motivated in part by Mr. Howard's dislike of the McCollum family. The Court of Appeals concluded that Timothy McCollum proved a prima facie case of sex discrimination, but that the prima facie case was rebutted by evidence showing, in part, the Postmaster's antipathy toward the McCollum family, Appendix 13. R3-40-67.

C. Existence of Jurisdiction in the Court Below

Petitioners' applicable claims in the United States District Court for the Northern District of Georgia are based on 42 U.S.C. 2000e-16(c). The case was reviewed by the United States Court of Appeals for the Eleventh Circuit pursuant to 29 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT PERSONAL ANIMOSITY BETWEEN THE SUPERVISOR AND COMPLAINING EMPLOYEES AND MEMBERS OF THE COMPLAINING APPLICANT'S FAMILY IS A LEGITIMATE NONDISCRIMINATORY REASON FOR EMPLOYMENT DISCRIMINATION SO AS TO REBUT PETITIONERS' PRIMA FACIE CASE OF SEX DISCRIMINATION.

Although the District Court found that none of the Petitioners made a prima facie case, the Court of Appeals disagreed as to Charlene McCollum and Timothy McCollum. Appendix 11, 13. The Court went on to hold, however, that such prima facie cases were rebutted by legitimate nondiscriminatory reasons articulated by respondent. Both the District Court and the Court of Appeals seemed strongly influenced by the obvious bad feelings between the Postmaster and the McCollum family. R3-40-82, Appendix 3, 11, 13.

Yet, as this Court has said, the type of reason which must be advanced by defendant after proof of a prima facie case is a legitimate one as well as a nondiscriminatory one. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). All too often persons involved in the litigaton and adjudication of Title VII cases pass quickly over the word "legitimate" and focus exclusively on the word "nondiscriminatory." The first requisite of legitimacy cannot be overlooked.

We submit that any reason based on a personality clash or any personal feelings of ill will cannot be a legitimate reason. This is of particular concern here since the District Court specifically held in its opinion, in dismissing Timothy McCollum's case, "With such personal discord between Postmaster Howard on the one hand, and the McCollum family on the other, Postmaster Howard could not be faulted if his personal dislike for the family influenced his employment decision." R3-40-82. A federal managerial official must not let his personal

feelings of animosity toward an employee or applicant, let alone a member of the employee's or applicant's family, dictate his judgment on personnel decisions. He must base his decisions on qualifications and performance, not his personal relationships.

The Postmaster's attitude toward Charlene McCollum is different from his attitude toward many of the other females in the Rome Post Office. Indeed in the cases of Tony and Timothy McCollum, those petitioners point to preferential treatment of certain female employees. It is the contention of all three petitioners that the favored female employees behave in accordance with Mr. Howard's stereotyped feelings of how females should behave. He makes his views obvious with his comment in Tony McCollum's administrative hearing that he has more female than male rural carrier substitutes because "It's almost impossible to get a man because he has to make a living." Petitioners' Trial Exhibit 31, p. 138.

Even with regard to the legitimate reasons articulated by respondent for his actions against Charlene McCollum, petitioners may show pretext "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983) quoting *Burdine, supra.* Petitioners submit that the disparity in treatment of petitioners and the other employees discussed earlier herein and the involvement of the Postmaster's personal feelings in his managerial decisions show that his proffered explanation is not worthy of credence.

With regard to Timothy McCollum, the legitimacy of the proffered reason is additionally suspect since the Postmaster advanced four different reasons on various occasions, in testimony and in written form. He stated that he did not hire Timothy McCollum because he falsified his application, a reason stated by Mr. Howard's superiors, the Atlanta Sectional Center and the Office of the Postmaster General not to be appropriate, and a reason obviously not accepted by Mr. Howard's superiors since Timothy McCollum remained on hiring registers. R3-40-63, 64.

Mr. Howard also said that he did not hire Timothy McCollum because he was impossible to work with or around, a decision Mr. Howard based solely on his feelings about Vickie Dorsey, not Timothy McCollum. R13-631-636.

Mr.Howard also relied on his alleged feeling that hiring Timothy McCollum would have resulted in too many members of one family working at the Rome Post Office. Yet this is not in violation of any Postal regulation or statute, and there were cases other than the McCollums of relatives working in the Rome Post Office. R3-40-67.

With regard to the alleged reason of Timothy McCollum failing to respond to a call-in notice, this was admittedly not a reason since Mr. Howard later testified that he would not have hired Timothy McCollum even if he had responded to the call-in notice which allegedly was sent to him. R3-40-65, 66.

The Court of Appeals correctly stated that personal animosity "is not proscribed by Title VII." Appendix 11. Petitioners do not say that it is. Petitioners merely say that it should not be accepted by the Courts as a legitimate nondiscriminatory reason sufficient to rebut a prima facie discrimination case. It is nondiscriminatory; however, it is certainly not legitimate.

II.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONER TONY McCOLLUM DID NOT MAKE A PRIMA FACIE CASE OF SEX DISCRIMINATION AND RETALIATION.

The District Court found that Tony McCollum failed to make a prima facie case of sex discrimination because he did not show that he was treated differently from comparable female employees. The Court of Appeals agreed. Appendix 13. The District Court found that two female employees comparable to Mr. McCollum, June Moyer and Dorothy Hubbard, were both ultimately assigned substitutes. R3-40-80. This is not entirely correct and does not deal with all the comparable

female employees. The District Court stated elsewhere in its opinion that Dorothy Hubbard served a vacant route for approximately eight months without a substitute, except for a two or three day period when she was sick. R3-40-48. Thus she was not ultimately assigned a substitute on a regular basis as was Tony McCollum. The District Court also recognized at R3-40-48, 49 that another female rural carrier, Faye Evans, served a vacant route for five months and was assigned a substitute only after three and one-half months and only then upon her request. With regard to June Moyer, while the record reflects that she was assigned a substitute, it does not reflect how long she served before being assigned a substitute.

Thus the two female employees who can most directly be compared with Tony McCollum were treated decidedly better than he was from the point of view of being able to earn overtime pay.

With regard to having or not having a two-day weekend once a substitute was assigned, the record reveals that when Faye Evans did receive a substitute, she had Saturday as an off day, as did June Moyer when she received a substitute. R3-40-49. Unlike Tony McCollum, these two female employees did have a normal two-day weekend.

With regard to the letter of warning, both Courts held that Tony McCollum did not make a prima facie case because he did not show that women were treated more favorably than he was. Petitioner respectfully urges that he did make such a showing. The evidence already cited shows that several female rural carriers were treated more favorably than Mr. McCollum concerning opportunities to make overtime pay and ability to have a normal weekend rather than two non-consecutive off days. It is also submitted that Dorothy Hubbard was hired as an emergency substitute by Mr. Howard some years ago and still remains employed despite the fact that she has twice failed the examination for substitute rural carrier. R13-736. When her government driver's license was suspended as a result of her being at fault in an automobile accident, the Postmaster drove her around her route so that she could deliver it. She thus did not lose any pay as a result of the suspension. R13-738. This situation occurred in the face of the

Postmaster's stated position that suspending a carrier's driver's license when the carrier is determined to be at fault in an automobile accident is disciplinary action and results in lost pay to the carrier. Petitioners' Trial Exhibit 104, pp. 432, 433.

Both Courts found that Tony McCollum did not prove a prima facie case on the retaliation issue because the Postmaster stated that he did not know of Mr. McCollum's representation of his mother in her discrimination complaints. R3-40-79. Yet this is evidence which should be considered on the issue of whether respondent rebutted the prima facie case. The causal connection between the protected act and the retaliatory action may be shown by demonstrating that the retaliatory action "followed the protected activity so closely as to justify an inference of retaliatory motive." *Womack v. Munson*, 619 F.2d 1292, 1296, fn. 6 (8th Cir. 1980). See also to the same effect *McCarthy v. Cortland County Community Action Program*, 487 F.Supp. 333 (N.D.N.Y. 1980). With Tony McCollum's representation of his mother occurring in March and April 1981, with the Postmaster becoming involved in the process in April and May 1981 and with the adverse action occurring in May 1981, petitioners contend that the causal connection has been established. As the District Court apparently agreed, the other elements of a prima facie retaliation case, participation in a Title VII proceeding and subsequent adverse action, were shown by Tony McCollum. *Slotkin v. Human Development Corp. of Metropolitan St. Louis*, 454 F.Supp. 250 (E.D. Mo. 1978).

In view of the District Court's expressed belief that the Postmaster did not know of Mr. McCollum's participation in his mother's cases, one may wonder whether there is any benefit to petitioner in arguing whether that factor is to be considered as part of petitioner's prima facie case or as part of respondent's rebuttal of that case. The benefit is seen in the District Court's statement in its opinion with regard to Tony McCollum's case that "The issue of pretext, or whether the challenged action occurred for the employer's stated reason, is not before the Court unless the plaintiff states a prima facie case." R3-40-81. If the District Court felt that the petitioner made a prima facie case, it would have evaluated Mr. Howard's testimony in light of Mr. McCollum's evidence on pretext, which the Court apparently did

not consider. This may well have resulted in a different interpretation by the District Court of such testimony.

The District Court was influenced in its determination against a prima facie case by the fact that the problems between Mr. McCollum and Mr. Howard dated back to 1978, well before any protected activity by Tony McCollum. Yet the relationship between the two since 1978, while not good, did not lead to such significant overt acts as complained of until immediately after Tony McCollum's participation in his mother's discrimination cases. It is no defense to sex discrimination or retaliation charges to say that the defendant is influenced by additional factors aside from sex or retaliation. It is enough for Tony McCollum to show that sex or retaliation was a factor influencing the Postmaster's treatment of him. *Bibbs v. Block*, 749 F.2d 508 (8th Cir. 1984).

CONCLUSION

For the foregoing reasons, it is urged that the lower courts' decision as to rebuttal of petitioners' prima facie cases was contrary to the proper interpretation of this Court's decisions and therefore it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

Charlene McCOLLUM,
Plaintiff-Appellant,
v.
William F. BOLGER, et. al.,
Defendants-Appellees.

Tony D. McCOLLUM,
Plaintiff-Appellant,
v.
William F. BOLGER, Postmaster General
and National Rural Letter Carriers Association,
Defendants-Appellees.

Timothy D. McCOLLUM,
Plaintiff-Appellant,
v.
William F. BOLGER, Postmaster
General, Defendant-Appellee.

Nos. 85-8680, 85-8681 and 85-8682.

United States Court of Appeals,
Eleventh Circuit.

July 23, 1986.

Appeals from the United States District Court for the Northern District of Georgia.

Before CLARK, Circuit Judge, HENDERSON,* and WISDOM,** Senior Circuit Judges.

*See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

WISDOM, Senior Circuit Judge:

This is not the usual employment discrimination case, as one might think from the pleadings. The dispute here began and continued as a result of the personal animus the plaintiffs bore for a postmaster for whom they blame for certain set-backs they suffered as postal employees.

The plaintiffs are three members of the McCollum family. The local defendant is George T. Howard, Postmaster of the Rome, Georgia, branch of the United States Postal Service (USPS). Although many issues have been presented by the parties, the primary issue on appeal is what constitutes a legitimate, nondiscriminatory reason for personnel action adverse to an employee. In addition to their animus against Howard, two of the plaintiffs did not get along well with their union representatives and they have appended unfair representation claims to their discrimination complaints.

The plaintiffs are Charlene McCollum and her two sons, Tony and Timothy McCollum. Charlene and Tony are rural letter carriers in Rome, Georgia. Timothy applied for employment as a rural letter carrier in Rome and was rejected. The plaintiffs have asserted claims against the Postmaster General of the United States and several other defendants. These claims may be grouped into three categories: constitutional claims, Title VII claims, and unfair representation claims. The district court dismissed one of these claims, granted the defendant's motion for summary judgment on another and entered a judgment on the merits in favor of the defendants on the remaining claims. We AFFIRM.

I. FACTS

Charlene McCollum began working at the Rome, Georgia Post Office as a substitute rural letter carrier in 1972. She became a regular rural carrier five years later. Tony McCollum went to work as a substitute carrier in 1977 and became a regular carrier in 1982. Timothy McCollum applied to be a substitute carrier in 1979. His application was denied. His sister, Vickie Dorsey, applied at the same time and

was also rejected. The Postmaster in Rome during these years, George T. Howard, supervised the work of Charlene and Tony McCollum and reviewed Timothy McCollum's employment application.

There was evident hostility between the McCollum family and Postmaster Howard that began in the late 1970's and intensified over the years. In 1981 Charlene McCollum's route and another carrier's route were reduced in length because they were overburdened. Both carriers were then classified at a lower pay level. The other carrier was a male whose pay was slightly higher than Charlene McCollum's pay after the reclassification – approximately $15 more per week. In the same year her route was reduced, Charlene McCollum was issued a notice of removal from employment with the USPS. The grounds for her removal were insubordination and failure to follow instructions. The removal was later converted to a 78-day suspension. She filed a complaint of age and sex discrimination with the USPS. The bases of her complaint were the reduction of her route and her removal.

Tony McCollum represented his mother in pursuing her discrimination complaint. Also, he replaced his mother as the carrier for her route during her suspension. For the first few weeks he filled his mother's position, Tony worked six days a week, earning overtime pay on Saturdays. Postmaster Howard reduced Tony's work week to five days by assigning a substitute carrier to work on Wednesdays. This deprived Tony of overtime pay and of a two-day weekend. On the first Wednesday his substitute was scheduled to work, Tony appeared at the Post Office even though he had been informed by Howard not to do so. Postmaster Howard issued a letter of warning to Tony because of this incident. Tony McCollum filed a discrimination complaint with the USPS. He argued that the reduction in his work week and the issuance of a warning letter were based on sex discrimination and also were an unlawful reprisal for representing his mother in her discrimination action.

At the same time they were feuding with Postmaster Howard, Charlene and Tony McCollum did not get along with their steward, John King. King was the local steward for the National Rural Letter Carriers Association (Union) from 1971 to 1981, when he was replaced

as steward by John Chandler. The McCollums filed four grievance complaints in 1983 – one by Charlene and three by Tony – that they assert were not properly handled by the Union. The reason they have proffered for the Union's failure to press their grievances is that John King maintained an influence over the Union and, because of his animosity toward the McCollums, he convinced John Chandler to drop their claims.

The many grievances against Postmaster Howard, the USPS, John King, and the Union, led the McCollums to filing lawsuits in the Northern District of Georgia in 1983. Charlene sued William Bolger, the Postmaster General,[1] for age and sex discrimination; the Union for breach of its duty of fair representaton; and Postmaster Howard for violation of her First and Fifth Amendment rights. Tony McCollum sued Bolger for sex discrimination; the Union for breach of its duty of fair representation; and the USPS for violation of his First and Fifth Amendment rights. Timothy McCollum sued Bolger for sex discrimination.

The district court granted Postmaster Howard's motion for summary judgment on Charlene McCollum's action against him for alleged constitutional violations. The court dismissed Tony McCollum's complaint against the USPS for lack of subject matter jurisdiction because the government's sovereign immunity had not been waived. After a bench trial, the district court entered a judgment for the defendants on the remaining claims. The plaintiffs filed a timely notice of appeal. We affirm.

II. CONSTITUTIONAL CLAIMS

Charlene and Tony McCollum allege that their First and Fifth Amendment rights were violated during the course of their employment with the USPS. Charlene sued only her supervisor, Postmaster Howard, while Tony sued only the USPS. The district court never reached the merits of these claims.

[1] William Bolger was the Postmaster General when these lawsuits were filed. He no longer serves in that position.

A. *Charlene McCollum*

The district court properly dismissed Charlene McCollum's constitutional tort action against Postmaster Howard. In *Bush v. Lucas*,[2] the Supreme Court held that a federal employee could not maintain a cause of action against his supervisor for violations of his First Amendment rights.[3] The Court declined to conclude that the Constitution supports a private cause of action in cases in which the plaintiff's claim for relief arises out of an employment relationship governed by procedural and substantive administrative provisions that establish an effective remedy for constitutional violations by the government.[4] The *Bush* analysis has been applied to Fifth Amendment claims as well as First Amendment claims.[5]

The *Bush* decision was based on a careful analysis of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[6] and its progeny,[7] cases in which the Supreme Court held that the Constitution provided a cause of action for damages against federal officials. The *Bivens* line of cases confers "adequate power to award damages to the victim of a constitutional violation", except when Congress establishes an alternative remedy and indicates, either explicitly or implicitly, "that the Court's power should not be exercised".[8] Without such an indication from Congress, the federal courts must fashion damage remedies for constitutional violations as would any common law court, "paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation".[9]

[2] 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983).

[3] *Id.* at 380-90, 103 S.Ct. at 2412-18.

[4] *Id.*

[5] *See Wells v. Federal Aviation Administration*, 755 F.2d 804, 809 (11th Cir.1985).

[6] *See Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

[8] *Bush v. Lucas*, 462 U.S. 367, 378, 103 S.Ct. 2404, 2411, 76 L.Ed.2d 648 (1983).

[9] *Id.*

The special factor in *Bush* that counselled hesitation was the plaintiff's employment relationship with the federal government, which was governed by a comprehensive remedial scheme: the federal civil service laws. The Court deferred to the "considerable familiarity [of Congress] with balancing governmental efficiency and the rights of employees", and also the ability of Congress to "inform itself through fact-finding procedures that are not available to the courts".[10]

Unlike the plaintiff in *Bush*, Charlene McCollum is not protected by the civil service laws. Her employment status is, nonetheless, governed by a comprehensive procedural and substantive system that provides an adequate remedy. In creating the USPS, Congress expressly authorized "final and binding grievance provisions in Postal Service collective bargaining agreements, 39 U.S.C. § 1206(b)".[11] The collective bargaining agreement that governs Charlene McCollum's employment with the USPS establishes a multi-step system for processing employee grievances. The plaintiff's union has a duty to represent her fairly in pursuing her claims against the USPS.

The plaintiff argues that the collective bargaining agreement is an inadequate substitute for the civil service laws. In particular, she contends that the grievance system is insufficient protection for an employee because the employee has a right to file only an initial complaint. The Union then decides whether to appeal an adverse decision by the USPS.

[1] It is clear that the grievance system is different from, and may provide less protection than, the civil service remedies. This fact is irrelevant, however. Our only concern is whether the grievance system "offers an adequate measure of relief".[12] The Union's authority to decide whether to appeal an adverse ruling is not dispositive because the Union has a duty to represent employees fairly and liability will attach should it fail to do so. We agree with the Seventh Circuit's decision in *Ellis*

[10] *Id.* at 389, 103 S.Ct. at 2417.

[11] *Ellis v. United States Postal Service*, 784 F.2d 835, 839 (7th Cir.1986).

[12] *Heaney v. United States Veterans Administration*, 756 F.2d 1215, 1221 (5th Cir.1985).

v. United States Postal Service,[13] in which the court concluded that it was unable to discern "how the means for redressing grievances in the Postal Service are markedly less adequate or less comprehensive than the civil service remedies in *Bush*".[14] The court held that the multi-step grievance procedure is constitutionally sufficient. Charlene McCollum had access to this system and, therefore, she may not maintain a constitutional tort action against her supervisor, Postmaster Howard.

B. *Tony McCollum*

Tony McCollum asserts that the USPS tortiously violated his rights protected by the First and Fifth Amendments. The district court dismissed this *Bivens*-type claim for lack of subject matter jurisdiction. We affirm.

[2,3] *Bivens* authorizes suits against individual federal officials, not against the United States.[15] Only if the United States has waived its sovereign immunity in this case may Tony McCollum's constitutional claims against the USPS for damages be adjudicated. The plaintiff points to 39 U.S.C.§ 401(1), which authorizes the USPS to "sue and be sued in its own name", and argues that this provision constitutes a waiver of sovereign immunity. The plaintiff is correct, but his analysis is not complete because 39 U.S.C. § 409(c) limits the waiver of sovereign immunity found in 39 U.S.C. § 401(1). Section 409(c) applies the Federal Tort Claims Act (FTCA) to the Postal Service.[16] Any tort claim against the USPS must be cognizable under the FTCA.

[4,5] Tony McCollum alleges that the USPS committed constitu-

[14] *Id.* at 839.

[13] 784 F.2d 835 (7th Cir.1986).

[14] *Id.* at 839.

[15] *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005.

[16] This section reads:
The provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

tional torts. Federal constitutional torts, however, are not within the scope of the FTCA. That statute waives the sovereign immunity of the United States for the tortious acts of its employees only "if such torts committed in the employ of a private person would have given rise to liability under state law . . ."[17] By definition, constitutional torts are not based on state law. As the Second Circuit concluded, in holding that the federal courts have no subject matter jurisdiction over claims alleging constitutional torts by the USPS, the "waiver of sovereign immunity contained in [the FTCA] . . . is limited to a tort cause of action cognizable under state law".[18] The district court had no subject matter jurisdiction over Tony McCollum's claim against the USPS; therefore, it was properly dismissed.

III. TITLE VII CLAIMS

The three plaintiffs in this case each allege that they were discriminated against by the defendant Bolger on the basis of sex.[19] The burden of proof in a Title VII case is well established. A female employee proves a case of sexually discriminatory treatment by showing that she was treated less favorably than others because of her sex.[20] The same test is applied to a male employee. In *McDonnell Douglas Corp. v. Green*,[21] the Supreme Court propounded a three-part model of proof for claims of disparate treatment. First, the plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff should establish this prima facie case, the burden of producing evidence shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the adverse personnel action.[22] Thus, if the defendant carries this burden, the plaintiff

[17] *Birnbaum v. United States*, 588 F.2d 319, 322 (2d Cir.1978).

[18] *Keene Corp. v. United States*, 700 F.2d 836, 845 n. 13 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

[19] Charlene McCollum has dropped her age discrimination claim.

[20] *See Zahorik v. Cornell University*, 729 F.2d 85, 91 (2d Cir.1984).

[21] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[22] *Id.* at 802, 93 S.Ct. at 1824.

must then show that the defendant's reason was pretextual. The ultimate burden of persuasion always remains with the plaintiff, who must prove that she was the "victim of intentional discrimination".[23]

The district court held that Tony McCollum had failed to make a prima facie case. The court further held that Charlene and Timothy McCollum had failed to make prima facie cases, and that the defendant had offered legitimate, nondiscriminatory reasons for his actions, which the plaintiffs had failed to show were pretextual.

A. *Charlene McCollum*

Charlene McCollum argues that she was the victim of sex discrimination on two occasions: first, when her route was reduced in length and her pay cut; and second, when she was removed from the USPS. Her removal was converted to a 78-day suspension and will be treated as a suspension for purposes of this lawsuit.

1. *Route Reduction.* The following facts were proved at the trial. Two postal routes in Rome, Georgia were overburdened according to USPS guidelines. Charlene McCollum handled one of the routes and a male carrier handled the other. Mrs. McCollum does not dispute that both routes were overburdened and should have been reduced. She objects, however, to the cut in pay that accompanied the reduction in the length of her route. Her pay, after the route reduction, was less than the pay of four other male letter carriers whose routes had "box factors"[24] and mileage less than the "box factor" and mileage of Mrs. McCollum's route. High mileage and a high "box factor" indicate that a route is difficult and the carrier's pay should be higher than usual. One of the four men was the carrier whose route was reduced at the same time that Mrs. McCollum's route was cut.

[6, 7] The district court concluded that Mrs. McCollum had failed

[23] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

[24] The "box factor" is a figure based on the volume of mail delivered and number of boxes served.

to make a prima facie showing of discrimination, a conclusion with which we disagree. The facts outlined above were sufficient to establish a prima facie case. Proof of a prima facie case, however, is not proof of discrimination. It is merely evidence of disparate treatment from which the trier of fact may infer a causal connection between an adverse action and the alleged basis for discrimination – in this case, sex.[25] The plaintiff proved that she was treated differently from male letter carriers. This raises an inference of discrimination, which the defendant must rebut with evidence of a legitimate, nondiscriminatory reason for his actions.

[8] As the district court properly concluded, the defendant articulated a legitimate, nondiscriminatory reason for the treatment of Mrs. McCollum. There was undisputed testimony by an official of the Union that, according to the USPS national practice, the plaintiff's route should have been reduced even further. Postmaster Howard requested, however, that the route be reduced as little as possible so as to avoid cutting the plaintiff's pay significantly. Furthermore, the Union official testified that there are a number of criteria used by the USPS in calculating a letter carrier's pay grade in addition to her route's "box factor" and mileage. The plaintiff's route had fewer boxes and was estimated to take less time to complete than the routes of three of the four male carriers who made more money than she. The male letter carrier whose route was reduced at the same time as Mrs. McCollum's received only $15 more per week than she did. His route had a higher time factor and many more boxes. Another male letter carrier made the same amount of money as the plaintiff, even though his "box factor" was significantly higher. We agree with the district court that there "is no evidence Mrs. McCollum drew less than she was entitled to based upon her route after it was reduced in an entirely proper manner."

[9] 2. *Suspension.* Mrs. McCollum contends that she was suspended for 78 days on account of her sex. She asserts that her punishment was disproportionate to her alleged offenses, which can be sum-

[25] *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80, 98 S.Ct. 2943, 2950-52, 57 L.Ed.2d 957 (1978).

marized as failing to follow instructions from a supervisor. The district court found that she was treated more harshly than similarly situated male employees at the Rome Post Office. The record supports this finding and we conclude that this constitutes proof of a prima facie case of sex discrimination. The record makes clear, however, that the reason for this disparate treatment was not sex discrimination. Mrs. McCollum had a bad relationship with her supervisor, Postmaster Howard, and she also disagreed with her superiors as to how her job should be performed. Competent witnesses testified that the plaintiff did not get along with her supervisor and was "a combative, hostile, rude, vindictive and dictatorial employee". These factors, in addition to her failure to follow instructions were the reasons for her lengthy suspension.

[10, 11] Title VII prohibits discrimination; it "is not a shield against harsh treatment at the work place".[26] Personal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII.[27] The plaintiff cannot turn a personal feud into a sex discrimination case by accusation. There was no proof offered to show that Postmaster Howard was prejudiced against the plaintiff or any other woman on account of sex. Mrs. McCollum failed to carry her ultimate burden of persuasion.

B. *Tony McCollum*

[12] Tony McCollum argues that the rescheduling of his work week in May 1981 and the letter of warning he received in the same month were the result of sex discrimination and also in retaliation for representing his mother in pursuing her discrimination claim against the USPS. Retaliation for participation in Title VII proceeding is, of course, prohibited.[28] To establish a case of retaliation, a plaintiff must

[25] *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80, 98 S.Ct. 2943, 2950-52, 57 L.Ed.2d 957 (1978).

[26] *Jackson v. City of Killeen*, 654 F.2d 1181, 1186 (5th Cir.1981).

[27] *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir.1984).

[28] *See* 42 U.S.C.§ 2000e-3(a).

prove that (1) there was a statutorily protected participation, (2) an adverse employment action occurred, and (3) there was a causal link between the participation and the adverse employment action.[29] The district court concluded that Tony McCollum had failed to prove a prima facie case of retaliation or sex discrimination.

1. *Rescheduled work week.* Tony McCollum replaced his mother as the carrier for her route after she was suspended in April 1981. For the first several weeks, he worked six days a week and received overtime pay for his work on Saturdays. In late May, Postmaster Howard decided to reduce overtime expenses at the Rome Post Office by assigning a substitute carrier to replace Tony McCollum on Wednesdays. Mr. McCollum thus lost a full day of overtime pay and was unable to enjoy two-day weekends.

Mr. McCollum alleges that the rescheduling of his work week by Postmaster Howard was motivated by sex discrimination. Two female carriers were allowed to work for longer periods of time without a substitute and, therefore, were able to earn more overtime pay. One of the two women did receive a substitute, after three and one-half months, and the substitute worked on Saturdays. Another female carrier who served without a substitute for only a short period also received a substitute on Saturdays.

[13] Even if these facts were sufficient to create an inference of discrimination against Tony McCollum, the defendant rebutted this inference by articulating non-discriminatory reasons for the rescheduling of Mr. McCollum's work week. Postmaster Howard wanted to reduce overtime costs. A substitute carrier who was familiar with Mr. McCollum's route was assigned to work on Wednesdays because she could not work on Saturdays.

[14] The rescheduling of McCollum's work week was not done in retaliation for his participation in his mother's Title VII suit. The evidence showed that his supervisor, Postmaster Howard, did not know

[29] *Canino v. United States Equal Employment Opportunity Commission*, 707 F2d 468, 471 (11th Cir.1983).

that Mr. McCollum was repesenting his mother. The rescheduling could not have been retaliatory and, therefore, the defendant failed to prove a prima facie case. Also, the defendant advanced a legitimate reason for the rescheduling, which would overcome a prima facie case.

2. *Warning Letter.* In mid-May 1980, Postmaster Howard notified Tony McCollum verbally and in a certified letter that a substitute carrier, Jane Green, would work for him on Wednesdays beginning the next week and that he should not report for work on those days. Mr. McCollum refused to accept the certified letter, which was delivered to him at work and was clearly marked as an official USPS notice. Tony McCollum called Jane Green the night before her first day as a substitute for him. He testified that he told Ms. Green that he would appear for work the following day, but that she should deliver the mail on his route. Ms. Green testified that Mr. McCollum told her not to report for work the next day. Mr. McCollum appeared for work on Wednesday, May 20, 1981 and was issued a letter of warning for failure to follow instructions.

[15] Tony McCollum did not offer any proof of a similarly situated female who was treated less favorably than he. Thus he did not prove a prima facie case. Furthermore, the defendant had a legitimate reason for issuing the warning letter: Mr. McCollum's failure to follow instructions. The letter was not issued in retaliation for Mr. McCollum's representation of his mother because Postmaster Howard was unaware of this activity.

If there was any other reason for the actions against Mr. McCollum by Postmaster Howard, it was the animosity between the McCollum family and Howard. As we stated above, personal dislike is not sex discrimination and is not proscribed by Title VII.

C. *Timothy McCollum*

[16] Timothy McCollum applied for and was qualified for the position of substitute rural carrier. He was not hired and a woman was selected for the position. This is sufficient proof of a prima facie case of discrimination. Beyond this limited proof, however, Timothy

McCollum has failed to show that Postmaster Howard discriminated against him on the basis of sex.

[17] Mr. McCollum's sister, Vickie Dorsey, applied for the same position at the same time as her brother. Both had almost identical records and test scores. Neither was hired. The evidence showed that Postmaster Howard did not want to hire any more members of the McCollum family. In addition to his antipathy toward the family, he thought it would create an appearance of impropriety if three or four members of the same family should work as letter carriers in the same post office. Also, there was evidence suggesting that Mr. McCollum and his sister made false statements on their applications by denying that any of their relatives worked for the federal government. At the time they filed their applications, both of their parents and their brother were employed by the USPS. These reasons were more than adequate to justify rejecting Timothy McCollum's application.

The most persuasive evidence proving that Timothy McCollum was not the victim of sex discrimination is that Postmaster Howard offered the position to three men, all of whom declined to accept, before offering the job to a woman. Mr. McCollum has failed to prove a case of sex discrimination.

IV. UNFAIR REPRESENTATION CLAIMS

[18] Charlene and Tony McCollum failed to prove sex discrimination. Their only recourse for redress of improper treatment based on causes other than discrimination was utilization of the grievance system provided by the National Agreement between the USPS and the Union. As rural carriers, they are entitled to the protection of the system whether or not they are members of the Union. The Union has a duty to represent them in employment matters involving the USPS and cannot arbitrarily refuse to process a meritorious grievance nor handle it perfunctorily.[30] The Union need not pursue a matter merely because an employee wishes it to do so. Yet if the Union's refusal to represent an employee is motivated by bad faith or hostility toward the employee,

[30] *See Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

the Union has breached its duty of fair representation.

Charlene and Tony McCollum allege that USPS breached its collective bargaining agreement and that the Union unfairly represented them. To succeed, they must prove: (1) a violation of the collective bargaining agreement; (2) a meritorious grievance; and (3) arbitrary or bad faith representation by the Union.[31] The only incidents about which they can complain are those that occurred within the six months prior to the date they filed suit.[32] The district court found no merit in the plaintiffs' claims.

A. *Charlene McCollum*

Charlene McCollum has one grievance that she complains was not processed fairly by the Union. A fellow USPS employee dented Mrs. McCollum's car in the parking lot of the Rome Post Office. Mrs. McCollum was upset by this incident and voiced her displeasure. Another USPS employee made some comments to her about the situation, which Mrs. McCollum said amounted to harassment. She complained to the Union and demanded that the USPS stop her co-worker from harassing her. The local steward for the Union filed a grievance, but later dropped it.

[19, 20] Mrs. McCollum's claim is without merit for two reasons. First, the USPS has no obligation to monitor the personal relationship between two of its employees. Second, the Union did not breach its duty of fair representation. The steward, John Chandler, investigated the grievance and determined, with just cause, that it lacked merit. The plaintiff asserts that her bad relationship with the previous steward, John King, somehow prejudiced her dealings with the current steward, John Chandler. There was no credible evidence, however, that any ill feelings affected the processing of Mrs. McCollum's grievance. Her complaint simply lacked merit.

[31] *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 1512, 164-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983).

[32] *Id.* at 154-55, 103 S.Ct. at 2285-86.

Tony McCollum cites three incidents that he alleges gave rise to valid grievances, which the Union did not pursue. Each was minor and did not involve a breach by the USPS of its collective bargaining agreement. The Union investigated each claim and decided not to pursue them based on their lack of merit. There was no breach of the Union's duty of fair representation.

V. CONCLUSION

Winding our dreary way through these bitter personal animosities we finally come to the close. The district court properly granted Postmaster Howard's motion for summary judgment and the USPS's motion to dismiss. We also agree with the district court's disposition of the plaintiff's discrimination claims. The plaintiffs in this case would have us believe that one individual, Postmaster Howard, discriminated against Charlene McCollum because she was a woman and against her sons because they were men. The contradiction is obvious. The evidence points to a different explanation. The McCollums did not get along with Howard. They now seek to convert any adverse actions against them by him into discrimination claims. Despite the fact that the actions by Howard were based on legitimate reasons, the plaintiffs allege sex discrimination. Their arguments do not withstand scrutiny of the record. The McCollums were not the victims of sex discrimination or of unfair representation by the Union. The judgment of the district court is, therefore, AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CHARLENE McCOLLUM,

Plaintiff,

v.

CIVIL ACTION
NUMBER C83-170R

WILLIAM F. BOLGER,[1]
Postmaster General;
NATIONAL RURAL LETTER
CARRIERS ASSOCIATION,

Defendants.

TONY D. McCOLLUM,

Plaintiff,

v.

CIVIL ACTION
NUMBER C83-279R

WILLIAM F. BOLGER, Postmaster
General; NATIONAL RURAL LETTER
CARRIERS ASSOCIATION,

Defendants.

TIMOTHY McCOLLUM,

Plaintiff,

v.

CIVIL ACTION
NUMBER C85-95R

WILLIAM F. BOLGER, Postmaster
General,

Defendant.

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[1] Paul N. Carlin is now Postmaster General.

ORDER
STATMENT OF THE CASES

This is one of three actions heard by the Court in a consolidated trial in which plaintiffs, all members of the same family, allege Title VII violations against the Postmaster General. The plaintiffs, Charlene McCollum and Tony McCollum, each also allege the defendant, National Rural Letter Carriers Association, has violated its duty of fair representation.

The plaintiff, Charlene McCollum, also alleges age discrimination in violation of 29 U.S.C. § 633a.

Trial of these consolidated cases commenced before the Court, without a jury, on May 1, 1985 and extended through May 7, 1985, after which post trial submissions were made by the parties of proposed findings of fact and conclusions of law.

CHARLENE McCOLLUM

The plaintiff, Charlene McCollum, contends that her removal from the Postal Service, an action later converted to a 78 day suspension without pay, was motivated by, among other things, discrimination based on sex and age. The removal of plaintiff was the culmination of a long series of discriminatory actions against plaintiff by the agents of defendant Bolger going back to 1976 and based in part on discrimination against plaintiff because of her age and sex. Plaintiff also contends that the actions taken against plaintiff were much more severe than actions taken against younger and male employees in similar and even more serious situations.

One of the incidents preceding plaintiff's removal was the reduction of her rural route in length and number of stops, which resulted in a reduction of her pay. Plaintiff contends that this action was based on sex discrimination. At the same time plaintiff's route was reduced, a male rural carrier's route was reduced to a length and number of stops less than plaintiff's with his salary remaining higher than plaintiff's. At that time, the salaries of all male rural carriers in the Rome

Post Office were greater than plaintiff's, although her route was longer than anyone else, and only one male had a box factor (a figure based on volume of mail delivered and number of boxes served) which exceeded or even equaled hers.

Plaintiff contends the National Rural Letter Carriers Association breached its duty to fairly represent her in employment matters with the United States Postal Service. Plaintiff contends that defendant Union has refused to represent plaintiff in the contractual grievance procedure on numerous occasions dating back to August 1979 and continuing to and after the filing of the instant suit. Plaintiff also contends that union officials have spoken disparagingly of her and her son, also a postal employee, and have assisted Postal Service management in numerous confrontations between Postal Service management and plaintiff and her son. She contends that said actions by defendant Union were arbitrary, discriminatory and in bad faith.

Plaintiff contends defendant Bolger has violated 42 U.S.C. 2000e-16(a) which states: "All personnel actions affecting employees . . . in the United States Postal Service . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Plaintiff also contends defendant Bolger has also violated 29 U.S.C. 633a (a) which states: "all personnel actions affecting employees . . . who are at least 40 years of age . . . in the United States Postal Service . . . shall be made free from any discrimination based on age."

Plaintiff further contends the National Rural Letter Carriers Association has violated its duty of fair representation which gives rise to a cause of action under 29 U.S.C. 185 which states, in part: "(a) suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . . (b) Any labor organization which represents employees . . . shall be bound by the acts of its agents."

Plaintiff claims damages for back pay and benefits lost when she

was suspended for seventy-eight days without pay; for pay lost when her route was reduced; for damages, both monetary loss and for emotional distress, due to the union's failure to fairly represent plaintiff and for necessary attorney's fees and expenses of litigation.

The Postmaster General contends that all the actions of which plaintiff complains were taken for legitimate nondiscriminatory reasons. To the extent that plaintiff's complaint seeks to go beyond matters which have not been administratively exhausted, the Court would not have jurisdiction.

The defendant, National Rural Letter Carriers Association, contends that the Court, in its order of March 26, 1984, has limited plaintiff to proving a claim against the defendant Association relating to a so-called "grievance filed in connection with the car denting incident." This defendant claims (1) this alleged grievance, and the events relating thereto, have absolutely nothing whatsoever to do with the collective bargaining relationship between the defendant Association and the defendant, United States Postal Service. Because it is only a connection with this relationship that plaintiff can claim a violation of the duty of fair representation, the absence of such relationship herein is dispositive against plaintiff; defendant Association has no duty toward plaintiff in regard to the car denting incident; and (2) assuming *arguendo* that such a duty existed, the defendant Association and its agents fully satisfied its duty of fair representation, fully investigated the alleged incident, and decided for fair, impartial, and non-discriminatory reasons to not process the grievance further.

TONY D. McCOLLUM

The plaintiff, Tony D. McCollum, is a rural mail carrier at the Rome, Georgia Post Office. He contends that on numerous occasions over a long period of time he has been harassed and discriminated against by management of the Rome Post Office, particularly the Postmaster, G.T. Howard. At least two of such incidents, he contends, were motivated by discrimination against plaintiff because of his sex as follows:

1. Defendant's assigning of a substitute carrier to carry plaintiff's mail route one day a week, thus depriving plaintiff of an opportunity to earn overtime pay;

2. Defendant's requiring plaintiff to take Wednesday as his off day, thus denying him a normal two day weekend.

Tony McCollum also contends that at the same time and place defendant was taking these actions against plaintiff, the Postal Service allowed female rural letter carriers to carry routes six days a week at the Rome Post Office without being required to accept a substitute. When some female carriers were ultimately assigned substitutes, the carriers were allowed to take Saturday as a day off.

On or about May 21, 1981 plaintiff was given an official letter of warning allegedly for reporting to work when he was instructed not to work. Plaintiff contends that he had not been instructed not to work on the day n question and that the action against him was motivated by discrimination against plaintiff because of his sex and as reprisal because plaintiff had served as a representative in connection with his Mother's EEO complaint.

Plaintiff contends that defendant, National Rural Letter Carriers Association, has breached its duty to fairly represent him in employment matters with the United States Postal Service. Plaintiff contends that the defendant Union has refused to represent him in the contractual grievance procedure on numerous occasions dating back to April 1978 and continuing to and after the filing of the instant suit. Plaintiff also contends that Union officials have spoken disparagingly of plaintiff and his mother, also a postal employee, and assisted postal management in numerous confrontations between postal service management and the plaintiff and his mother. Plaintiff contends that such actions by defendant Union were arbitrary, discriminatory and in bad faith. Tony McCollum seeks damages for loss of overtime pay, for failure of the Union to represent him and attorney's fees and expenses of litigation.

Defendant, Rural Letter Carriers Association, contends it has

always repesented Tony McCollum fairly and that his error lies in his belief that when the Union does not adopt his position concerning a grievance, that the Union has violated the duty of fair representation as to him. As to the incidents Tony McCollum has alleged to be violations of the duty of fair representation, the Union claims the following:

November 26, 1983 — Purchasing Stamps Grievance

The Union contends it did not act improperly in this particular incident.

November 17, 1983 — The Recommendation of His Relative for a Job

The Union contends that a shop letter memorandum required the Union to stop processing the grievance, because employed relatives are not to recommend relatives who are applicants for jobs with the Postal Service.

June 16, 1983 — Incident Withholding Wages from Salary

The Union contends that the Union steward investigated this matter and found Tony McCollum had requested a salary advance and agreed to pay certain money back to the employer. Tony McCollum later refused to pay back the money. The Post Office therefore took the advance from McCollum's wages. Tony McCollum would not cooperate and would not give the steward McCollum's paycheck stubs.

Throughout, the Union has heard Tony McCollum, considered his grievances and pressed them or not as appropriate under the contract, past practice, or prior arbitration decisions, or employer written directives. The Union has never refused to process a grievance for any improper motive.

The ingredient in the Union's position concerning processing grievances or not is whether the employer has a winning position, and an arbitration or grievance procedure would be fruitless. The Union

has considered that problem as well.

The National Rural Letter Carriers Association contends the test for holding the Union in violation of the duty of fair representation is whether or not the Union's conduct as regards the grievance was arbitrary, capricious or in bad faith.

The Union has a pending claim for attorneys' fees as a counter-claim which it may later pursue.

Defendant Bolger contends that none of the acts of which plaintiff, Tony D. McCollum, complains were the result of prohibited discrimination or acts of reprisal.

In May 1981 plaintiff was a substitute ("sub") rural letter carrier working out of the Rome, Georgia office. The subs worked as needed for the regular rural carrier on their routes. Tony D. McCollum was substituting for his mother, Charlene McCollum, on her route. Mrs. McCollum had been dismissed from her route and it was temporarily vacant. As a result, plaintiff was working the route six days a week, for one of which he was being paid at overtime rates.

Another substitute carrier, Jane Green, a female, had worked the same route in the past and was familiar with it. The Rome Postmaster asked her to relieve plaintiff one day a week to eliminate the overtime being paid to plaintiff. She was already working Saturday on the route on which she regularly substituted so plaintiff could not be offered Saturday as his "off" day.

The elimination of the day for which plaintiff was paid overtime and the selection of Wednesday as his "off" day resulted from legitimate, nondiscriminatory reasons.

Similarly, plaintiff's letter of warning resulted from his failure to obey instructions, that is, not to show up for work on Wednesday when he had been told not to do so.

TIMOTHY McCOLLUM

Plaintiff, Timothy McCollum, is an applicant for employment with the Rome, Georgia Post Office. He contends that defendant's agents wrongfully failed and refused to consider him for employment because of discrimination based on plaintiff's sex. Plaintiff took and passed an examination for employment with the United States Postal Service and was thereafter placed on a register of persons eligible for employment as rural carriers in the Rome, Georgia Post Office. Plaintiff's test score placed him among the top candidates for such positions. After an unsuccessful attempt to have plaintiff removed from the register, defendant's Postmaster in Rome ignored plaintiff's eligibility for employment and filled two rural letter carrier positions with females.

Plaintiff further contends that, while he was still on the register, defendant's agents gave another examination for rural carriers and established another register, even though the register containing plaintiff's name had not yet been exhausted. Plaintiff also contends that at all material times he was fully qualified for the position of rural carrier and was properly on a register of persons eligible for such employment and from which defendant's agents were required to select new employees.

Plaintiff has exhausted administrative remedies and seeks damages in this action.

The defendant, Postmaster General contends that Timothy McCollum is not a victim of prohibited sexual discrimination. Timothy McCollum submitted an application for employment at the Rome, Georgia, Post Office in which he denied that any relative of his worked for the United States. At the time he completed his application for employment, his father, mother and brother were employed by the United States Postal Service. Postmaster Howard, to whom the application was directed, was concerned about hiring relatives of those already employed by the Postal Service and felt plaintiff's denial of his relationship with Postal Service Employees was deliberate. Plaintiff's sister had applied for employment at the same time as plaintiff. If both she and plaintiff were hired, there would be five members of

the same family working for the Postal Service in close geographical proximity, four of them in the same office. In a community with high unemployment, this would create an unfortunate appearance of partiality.

Neither plaintiff or his sister were hired by the Postal Service. The actions taken with respect to both by Postmaster Howard, who is the alleged discriminating official, are the same. There is no evidence of discrimination on the basis of sex.

JURISDICTION

The Court has jurisdiction under 42 U.S.C. 2000e-16, 29 U.S.C. 633a and 39 U.S.C. 1208. There are no questions concerning the jurisdiction of the Court.

Upon consideration of the evidence and submissions of the parties, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, Charlene McCollum, is female and is employed by the United States Postal Service, assigned as a rural carrier to the Rome, Georgia Post Office. At all times material to this complaint, George T. Howard was Postmaster of the Rome Post Office.

2. Each of the plaintiffs, members of the same family, allege Title VII violations against the Postmaster General. The alleged discriminating official is G.T. Howard, Postmaster, Rome, Georgia. Timothy McCollum also filed a later action, along with one filed by his sister, Vickie Dorsey, both of which were filed too late to be consolidated with the three older consolidated cases for trial. Ms. Charlene McCollum also alleged age discrimination in violation of 29 U.S.C. § 633a. Plaintiffs, Charlene McCollum and Tony McCollum also make claims against the National Rural Letter Carriers Association alleging a breach of the duty of fair representation.

3. Charlene McCollum, the mother of Timothy McCollum, Tony McCollum, and Vickie Dorsey, was the first member of this family to be employed at the Rome, Georgia Post Office. She began work there as a substitute rural mail carrier on January 17, 1972. She became a regular rural carrier on January 14, 1977. Charlene McCollum was the daughter of the former postmaster at Armuchee, Georgia, and the wife of its present postmaster, who succeeded her father in the job. Tony McCollum went to work at the Rome Post Office as a substitute rural mail carrier on December 17, 1977. He became a regular rural mail carrier on October 2, 1982. Timothy McCollum first applied for a job with the Postal Service on October 23, 1979.

4. The actions brought by Charlene and Tony McCollum were also directed against the National Rural Letter Carriers Association, the labor association to which they belonged, for breach of the duty to them of fair representation. Evidence was introduced in all three actions relating to a time period as early as 1976 and as late as 1984. With respect to the Title VII actions and the age discrimination action against the Postmaster General, however, Mrs. McCollum's action relates only to two EEO charges made in 1981; Tony McCollum's action relates to one made in 1981; and Timothy's action to one made in 1981.

5. It is evident that hostility has existed between the Postmaster and the McCollum family for some time. The Postmaster relates its beginning to his refusal to hire Timothy McCollum and Vickie Dorsey, children of Charlene McCollum and brother and sister of Tony McCollum. Charlene McCollum and Tony McCollum relate it to a 1976 incident involving the filling of an auxiliary rural route.

6. According to the terms of the National Agreement in effect in 1976, the auxiliary rural route position was to be given to the senior substitute rural carrier, at the time Charlene McCollum. Although the Postmaster testified that he never intended to give the route to anyone other than Charlene McCollum, both Charlene McCollum and Graham Grimes testified that Mr. Howard wanted to give the route to June Moyer and that the bad feelings between Mr. Howard and Charlene McCollum began when he was required by the language

of the National Agreement to give the route to Charlene McCollum. At that time, Charlene McCollum was 42 years old, and June Moyer was 36.

7. On April 4, 1981 and May 12, 1981, Charlene McCollum filed formal complaints of employment discrimination. The April 4, 1981 complaint related to a letter of removal which was issued to her on March 23, 1981. The May 12, 1981 charge related to an adjustment to her route which was effective in February of 1981. Tony McCollum's EEO complaint related to a letter of warning he received May 21, 1981, the Postmaster's refusal to permit him to work six days a week so that he could earn overtime on the sixth day, and, if he were not to be allowed to work six days, the Postmaster's refusal to give him Saturday as his "off day". Timothy McCollum's EEO complaint related to the Postmaster's refusal to hire him to go to work at the Rome Post Office.

8. While Mrs. McCollum dates the onset of her difficulties with management to 1976, when she perceived that the Postmaster was preferring another woman to her in the award of an auxiliary route for which she was the senior bidder, Mrs. McCollum got the route and there is no evidence to suggest that her perception had any basis in fact.

9. When Mrs. McCollum filed her EEO complaint in 1981, she asserted that the action in 1976 was age discrimination in favor of a younger woman. As late as her EEO hearing, however, then she only "thought" that the woman was younger and had no other evidence to support her age claim. In fact, there were six years difference between their ages.

10. Mr. Howard, the Postmaster, on the other hand, felt that there were no significant difficulties between management and the McCollum family until October of 1979 when he spoke to Mrs. McCollum about the applications of her son Timothy and her daughter Vickie Dorsey for a job at the Rome Post Office. He told her that he would be disinclined to hire either one of them because to have so many members of the same family working at the Post Office in a town

the size of Rome, Georgia, would be to give the appearance of favoritism. Postmaster Howard testified that from then on he experienced both open and covert hostility from Mrs. McCollum and her son Tony McCollum.

11. Differences between the McCollum family and both union and management became much more pronounced at the time Vickie Dorsey and Timothy McCollum applied for jobs. An anonymous letter, making unfounded charges against another employee, whom Tony and Charlene McCollum didn't like, was written six days after the Timothy McCollum and Vickie Dorsey applications and a signed letter was written by Charlene McCollum on April 20, 1980 to the Postmaster General making charges against Mr. Howard and against Mr. King, the local union steward who represented the rural mail carriers.

12. Mr. John King represented the McCollums until problems and difficulties between Mr. King and the McCollums made him decide to withdraw from representing them. He has a still different view of when the McCollums, mother and son Tony, began, in his opinion, to express open hostility toward both management and the union. He dates the difficulties between the Postmaster and Mrs. McCollum to August of 1979.

13. GSA, who is responsible for the maintenance of the Rome Post Office, cut back the lighting in the Rome Post Office in August 1979 by removing alternate bulbs. The light over Charlene McCollum's case, where she sorted mail, was removed, along with others, for a period of two days. Mrs. McCollum complained about this to Mr. Howard and to Mr. King. Mrs. McCollum perceived the dim lighting over her case to be a deliberate act of discrimination against her by the Postmaster, although there was never any evidence, either then, at the time of the EEO hearing, or at the trial, that this was so. The evidence was to the contrary. It was GSA who removed the lights and Mr. Howard who got Mrs. McCollum's light replaced at the earliest opportunity. Mrs. McCollum's case would not have been dim had she not earlier insisted on the removal of a light on the case because she said it caused glare.

14. Mrs. McCollum was not satisfied, however, merely to have the light replaced. She insisted that John King file a grievance demanding an apology to her from the Postmaster. Mr. King thought this was ridiculous, told her so, and refused to file the grievance. Mr. King testified that from this time forward Mrs. McCollum became openly hostile to the Postmaster and to him and difficulties with both Mrs. McCollum and Tony McCollum became much more pronounced.

15. Regardless of when any problem may have begun between Mrs. McCollum and the post office management the situation is at best unpleasant.

16. Mrs. McCollum has also had long-running problems with fellow employees. Mrs. McCollum had a substitute named Jane Green, who testified at trial. Tony McCollum substituted for another rural carrier named June Moyer, who also testified at trial. Both of these women were close in age to plaintiff Charlene McCollum. Mrs. McCollum was unpleasant to her substitute by the manner in which she gave her substitute orders, criticized her work, and issued instructions to her. Mrs. McCollum told her substitute that she, Charlene McCollum, was perfect and never made mistakes. When Mrs. McCollum would plan to be off for an entire week, she would nonetheless call Jane Green, her substitute, every day, rather than once, leaving Jane Green uncertain as to whether or not she really was going to be substituting for the entire week. This inconvenienced Ms. Green a great deal, since she drove a school bus and had to find a substitute to drive the bus if she had to deliver the mail for Mrs. McCollum. Mrs. McCollum would also wait until the last minute to give Ms. Green a call about substituting which created unnecessary stress and tension for Ms. Green. Mrs. McCollum also did not share her equipment with her substitute, contrary to the custom in the Rome Post Office.

17. Tony McCollum was living with his mother and father at the time he was substituting for June Moyer. When Ms. Moyer tried to contact Tony to have him substitute for her, she received no cooperation from Mrs. McCollum. She would be told that Tony was not home and that the family did not know how to reach him. Ms. Moyer was

understandably frustrated. In addition, if she needed Tony to volunteer to do a little extra work to help her, like on a particular day that she recalled when she was ill and asked him to case her mail for her, he refused to do so. Mrs. McCollum harassed Ms. Moyer both at work and at home. She started gossip about a relationship between Ms. Moyer and another rural carrier. She confronted Ms. Moyer in a grocery store about bidding on a route and upset Ms. Moyer so much she simply left her groceries and went home, only to find the phone ringing and Mrs. McCollum on the calling telephone.

18. Leather straps are used by postal employees to hold packets of mail together for ease in handling and to keep the mail in order for delivery after it is sorted.

19. On one occasion Mr. Howard ordered Mrs. McCollum to unlock her mail straps so that her substitute could use them. Except for this occasion there is no evidence in the record that Mrs. McCollum was treated any differently than any other employee with reference to postal equipment. This resulted from her failure to cooperate with her substitute.

20. Postal straps are furnished to the postal employees by local postal offices as the need may arise on a given route. Mrs. McCollum, however, chose to obtain her postal straps from her husband, a postmaster at a neighboring post office.

21. Buggies are used for the containing and moving of mail in the post office and to the carriers' vehicles. On one occasion Mr. Howard asked Mrs. McCollum to move her buggy. This was done to get the buggy out of a crowded aisle as it was inconveniencing other employees unnecessarily so that they had to go around her.

22. Mrs. McCollum has also complained about the locating of fans in the post office. The fans were placed by GSA and not by Mr. Howard. They could be moved by the employees. There is no evidence that Mr. Howard was in any way responsible for the fan not being placed to Mrs. McCollum's liking.

23. On an occasion when Tony McCollum was out the mail cases were rearranged. He complained that his was placed so that he was crowded and could not conveniently case his mail. When he complained to managment the problem was immediately rectified. There is no evidence that Mr. Howard was responsible for the initial placing of his case. The mail cases had been generally rearranged and there is no evidence that management deliberately placed his case so as to crowd and inconvenience Tony McCollum.

24. Mrs. McCollum wrote a letter to the Postmaster General in April 1980 making accusations against Mr. Howard and union steward King. Copies of the letter were not provided to Mr. Howard or Mr. King by Mrs. McCollum.

25. In her letter she accused Mr. King of being bribed not to properly represent rural cariers by a two hundred dollar incentive award which he received from Mr. Howard. Her letter contained the following statement about Mr. Howard:

> . . . the Postmaster, Mr. G.T. Howard, deliberately and purposefully with malice aforethought did intentionally forge and file a completely false complaint about me. He also illegally used a *customer's* name *without* said customer's knowledge or consent in fabricating this forgery. This action taken by Mr. Howard and him alone has left the Postal Service vulnerable to numerous legal retaliatory measures not only from myself but from an innocent and unknowing third party. Mr. Howard has violated Postal Regulations in addition to various State and Federal laws and statutes concerning forgery, falsification of Federal records, defammation [sic] of character, fraud, etc. Also, according to the Supreme Court of the United States, "every publication either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make his [sic] infamous, odious, or ridiculous, is prima facie a *libel.*" The customer can take legal action against the Postal Service and Mr. Howard for Mr. Howard's unauthorized use of her name in a complaint against a federal employee. She

> has indicated that she will consult a lawyer about taking said action. Since violations of Postal and Federal law are prosecuted by the Department of Justice, any charges and [sic] answered in a federal Court of Law.

There is no claim about sex or age discrimination in this three page, single-spaced letter.

26. The incident described in the letter arose out of a customer complaint by Ms. Sandra Stephens. Ms. Stephens was receiving mail at the address of a boxholder named Paula Carter. Once, while Ms. Stephens was attempting to inquire about her mail, Mrs. McCollum simply drove away from her. Angry at this discourtesy, Ms. Stephens reported it to Postmaster Howard. Mr. Howard brought the complaint to Mrs. McCollum's attention and told her not to contact Ms. Stephens. Mrs. McCollum visited the boxholder Ms. Carter, instead, who never made the complaint in the first place, upset Ms. Carter by telling her that the Postmaster had said that she had made a complaint, which Ms. Carter denied, and secured a statement from Ms. Carter that she had never made the complaint.

27. Mr. Howard told Mrs. McCollum not to contact the customer because on a previous occasion she had upset a Mrs. Tony Gilliland, another postal patron, by appearing at her business and confronting her about a complaint she had made about her mail delivery.

28. In the spring of 1980, Ms. McCollum grabbed Ms. Moyer's arm at work while Ms. Moyer was trying to case her mail. The ladies were separated by a supervisor. Soon after, the charges made in the letter to the Postmaster General were investigated. The investigator learned about the earlier incident involving postal patron Gilliland, the anonymous letter as to June Moyer, and the February 1980 incident when Mrs. McCollum grabbed Ms. Moyer's arm. The investigator concluded there would be less trouble if Jane Green were switched to being June Moyer's substitute and Tony McCollum were to switch to being his mother's substitute. Mrs. McCollum was given a letter of warning about her failure to obey instructions not to contact the patron in the Paula Carter/Sandra Stephens incident by Postmaster

Howard in June 1980.

29. One of the complaints made by Mrs. McCollum at the EEO hearing was the switching of substitute carriers without her permission. There is no evidence that this charge had to do with sex or age.

30. Mrs. McCollum also complains of the bidding on Route 1 in the Spring of 1981. Mrs. McCollum wanted to bid on Route 1. She believed she was the senior bidder and should have that route. The notice of posting was not prepared by Mr. Howard at the Rome Post Office, but was sent to him from the Sectional Center in Atlanta, Georgia. Management at the Sectional Center had placed a requirement on the posting that all regular rural carriers either bid or decline before the route could be awarded. Plaintiff bid on the route the first time. Not all the rural carriers either bid or declined. Therefore, pursuant to the directives of the Management Sectional Center, the route was posted a second time. Because plaintiff believed the second posting was illegal, she refused to bid on it, rather than bid on it then grieve the posting she believed to be illegal, if someone else were awarded the route. Not all regular rural carriers bid or declined the second time so it was ultimately posted a third or fourth time for the substitutes. It was actually awarded to a woman older than the plaintiff. There is no evidence that sex or age played a part in the award of Route 1.

31. All parties conceded at trial that you cannot grieve the awarding of a route if you do not bid on the route.

32. Plaintiff Charlene McCollum's, actual EEO complaints only involve two specific incidents, both of which occurred in 1981. One arose out of a rural route adjustment. In November of 1980, Mr. Howard received word from the Atlanta Sectional Center that two of the Rome rural routes were "overburdened". The routes were Route 8 and Route 9. Plaintiff's route was Route 9. A male carried Route 8. Plaintiff conceded at trial that her route was overburdened and that there was no discrimination in the selection of her route for adjustment.

33. In early 1981, upon the instructions received from the Atlanta Sectional Center, the Rome Post Office evaluated Charlene

McCollum's rural route, Route 9, and another rural route, Route 8, carried by a male employee, Henry G. Walker, to determine whether such routes should be reduced because they were overburdened. Both routes were classified as K47 at that time. Charlene McCollum's route was evaluated at 56:33, Mr. Walker's at 56:29. The minimum relief required for each route was two and one half hours.

34. When Charlene McCollum's route was a K47, her annual salary was $24,475. After the route adjustment, according to the Postmaster's testimony at Mrs. McCollum's administrative hearing, her route was classified as K45 effective February 2, 1981, and her salary was $23,012 per year. According to the information given plaintiff, the effective date was March 21, 1981 and the classification at that time was K43 with a salary of $21,563. Mrs. McCollum further testified that in May, 1982 her route was reclassified as K45 with an annual salary of $24,393. According to Mr. Howard's testimony at Mrs. McCollum's administrative hearing, the change to K45 came in August, 1982 with a salary of $24,749. Mr. Howard stated, however, that the salary increase was due to either a step increase or a cost of living raise and not to an adjustment in route classification.

35. Mr. Howard also testified that Charlene McCollum's route missed being a K46, with a higher salary, by one minute, and the male employee's route attained a K46 rating by one minute. There is no evidence this was intentionally done as an act against Mrs. McCollum.

36. Charlene McCollum testified that a rural carrier's pay is based on box factor and length of route. Until a carrier reaches Step 12, longevity would also affect pay. At the time of the route reduction, Charlene McCollum was at Step 12, and this pay differential between Charlene McCollum was at Step 12, and thus a pay differential between Charlene McCollum and other carriers would not be due to such other carriers having greater longevity than Charlene McCollum.

37. A box factor, as found in the comparison matrix in the U.S.P.S. Report of Investigation of Charlene McCollum's route reduction complaint, is, according to National Rural Letter Carriers Association official John King, based on volume of mail and number of

boxes. Basically, as Mrs. McCollum stated, the higher the box factor, the greater the difficulty in serving the route.

38. The comparison matrix in the Report of Investigation, Plaintiff's Ex. 79, shows that, after the reduction, Route 8 (carried by a male employee) was a K46 with an annual salary of $23,742 while plaintiff's route, Route 9, was a K45 with an annual salary of $23,012. That matrix also shows that Route 8 has a lower box factor and lower mileage than Route 9. The matrix further shows that Routes 2, 3 and 6 have lower box factors and less miles than Route 9, and all are carried by males whose salaries are higher than Charlene McCollum's.

39. Postal management official Joe Emerson testified that he and union steward John King rode around Charlene McCollum's route prior to the reduction decision. Mr. King testified that management had discussed the reduction in advance with him and he agreed that it was appropriate. A February 5, 1981 letter from Alvin Downs to Charlene McCollum included as a part of the United States Postal Service Report of Investigation of Mrs. McCollum's complaint, states that, although he has not seen the route himself, he has been assured by John King and a Postal Service official that the portion of the route being converted to city delivery fully qualified. He also expressed his opinion that when there are 41 box es on one mile of route, it is fully developed. Mr. Downs refused Charlene McCollum's request to file a grievance on the reduction .

40. The route reduction resulted in 42 boxes being removed from Charlene McCollum's route and being placed on city delivery. An article from the Association's official publication, the August 11, 1979 *National Rural Letter Carrier*, states that there have been numerous grievances on conversion of rural routes to city delivery and that the Association has recommended to local stewards that a grievance be filed whenever this occurs to keep the territory on rural routes.

41. Mr. Emerson, another supervisor, rode with Mr. King, the local steward for the rural carriers, on the route to participate in the adjustment. It is usual for the local union steward to participate in

a route adjustment so that there is not a violation of the collective bargaining agreement. Sex and age were not mentioned by either on the trip. Boxes on plaintiff's route which could easily be picked up by city delivery were assigned to city delivery. The route adjustment was predicated on a formula. Steve Smith, a regional representative of the National Rural Letter Carriers Association, who is extremely expert in these matters, testified as well as did management and the local steward, that the route adjustment was entirely just and evenhanded.

42. On March 23, 1981 Charlene McCollum received a notice of proposed removal from her position with the Postal Service based on alleged insubordination and failure to follow instructions. She filed a timely EEO charge on the matter and also filed a grievance attacking the removal. She was charged with

1. Improperly marking undeliverable mail

2. Improperly returning mail proper for delivery on her route

3. Continuing to deliver mail to customers no longer on her route after being told to cease delivery

One element of her past record was taken into account, a warning letter which she received for alleged failure to follow instructions in 1980.

43. Charge No. 1 involves four undelivered packages, one with a reason for nondelivery written on the back of the package, the other three allegedly not marked. Mrs. McCollum testified that she had at all times followed her supervisor's instuctions on the marking of undelivered packages. She further testified that one of the packages, that addressed to Frances Verner, was not on her route. The United States Postal Service Report of Investigation of Mrs. McCollum's complaint contains a notice dated 1-15-81 which was posted on the Post Office bulletin board as instruction to all employees. This notice states that the reason for nondelivery "must be shown on all parcels . . ."

44. Mr. Emerson, a supervisor, wrote the letter of discharge. The testimony was that the reasons for nondelivery of accountable mail was to be put on the back of parcels or other accountable mail pursuant to the instructions of supervision at the Rome Post Office and this Mrs. McCollum refused to do.

45. Although Charge No. 1 mentions a threat by Charlene McCollum to write the Postmaster General, an action not barred by regulations, Postal Service management testified that such a statement was not a basis for the action taken against her.

46. In Charge No. 2 Mrs. McCollum was charged with "stamping" not on Route 9" on letters which either were on Route 9 or, if they were not on Route 9, should not have been stamped at all, but instead put in the "misthrown" box so that they could be properly delivered on the right route the next day.

47. Charge No. 2 involves four pieces of mail allegedly improperly returned by Charlene McCollum. Postal officials acknowledged that one of the letters mentioned, the one addressed to Ada Beard, was not and never had been proper for delivery on Route 9. At Charlene McCollum's administrative hearing, Postal Manager Joe Emerson testified that all the letters discussed in Charge 2 were handled after January 23, 1981 and at that time, none of the addresses thereon were on Route 9, the three Huffaker Road houses which were once on Route 9 having been transferred to a city route. At the trial Mr. Emerson testified that he was mistaken in his administrative testimony and that the actual date for removal of these boxes from Charlene McCollum's route was February 7, 1981, a date apparently after the postmarked date of one of the Huffaker Road letters. No postmarks can be discerned on the other two Huffaker Road letters.

48. The Third charge related to her continuing to deliver mail to two boxes which had been removed from her route by the route adjustment. Mr. Emerson received a call from a postal patron who said that he was getting two deliveries a day. Upon investigation Mr. Emerson found two customers were getting two deliveries. He gave a photograph of the two boxes in question to the plaintiff so that,

even though there might have been an earlier misunderstanding, she would stop making these deliveries. The plaintiff insisted on receiving written instructions.

49. The two boxes to which Mrs. McCollum continued to deliver mail were those of the Wilkerson and Wallace families, which had been taken off her route. Both Charlene McCollum and Tony McCollum testified that Joe Emerson showed Tony McCollum a picture of two rural mail boxes, later identified as those of the Wilkerson and Wallace families, and told Tony McCollum that these were the last two boxes to be delivered on Route 9 after the route adjustment. Mr. Emerson testified in Charlene McCollum's administrative hearing that he could have mistakenly told Tony McCollum that these were the first two boxes to be delivered and that both Charlene McCollum and her substitute Tony McCollum could have been under the misapprehension until March 4 that they were supposed to serve these boxes.

50. It is undisputed that customers transferred off Charlene McCollum's route are not identified on the Form 4003 mentioned in Charge No. 3 which was given to Charlene McCollum on January 23, 1981.

51. Mr. Emerson testified that he told Charlene McCollum on March 4 to stop delivering mail to Wilkerson and Wallace, that she asked for written instructions which he refused and that she thereafter continued to deliver mail to those patrons. Both Tony McCollum and Charlene McCollum testified that they ceased delivery to both families as soon as Mr. Emerson instructed them to do so. Mr. Emerson acknowledges that, at some point, Charlene McCollum did stop delivery to the Wilkerson and Wallace families but he does not know when. He does not recall subsequent meetings with her on that subject after March 4.

52. The one element in Mrs. McCollum's past record which was considered in the removal action was a warning letter received by her on June 25, 1980. That letter charged her with failure to follow instructions by contacting a patron who was listed as a complaining party on a USPS Customer Complaint Form after the Postmaster

allegedly instructed her not to contact "the parties involved."

53. The customer complaint was filed by Sharon Stephens, a person then unknown to Charlene McCollum. The other name on the complaint form, Paula Carter, was familiar to Mrs. McCollum as the person who lived at the address shown on the complaint. The complaint was that the carrier had driven away while Ms. Stephens was questioning her about mail delivery. This incident is referred to in previous findings of fact by the Court in findings 26.

54. The Postmaster acknowledged in his testimony in the administrative hearing on Mrs. McCollum's discrimination complaint that he instructed Mrs. McCollum not to contact Sharon Stephens rather than not to contact "the parties involved" as is stated in the letter of warning. It is undisputed that Mrs. McCollum did not contact Sharon Stephens; she contacted Paula Carter.

55. When contacted by Charlene McCollum and when later contacted by someone on behalf of the Postmaster when he was replying to a critical letter which Mrs. McCollum had written to the Postmaster General, Paula Carter stated that she did not complain to the Postmaster about Mrs. McCollum. Ex. 3 to USPS Report of Investigation. Ms. Carter also stated in her June 9, 1980 affidavit, which the Postmaster included as part of his response to the Atlanta Sectional Center on Mrs. McCollum's letter to the Postmaster General, that Sharon Stephens was not a responsible person and was at times incapable of the truth. She further stated that it was her belief that Sharon Stephens went to the Postmaster and "concocted" a story about Mrs. McCollum. The Postmaster acknowledged that he had this statement from Mrs. Carter prior to Mrs. McCollum's removal and indeed prior to his issuance of a warning letter to her.

56. Mr. Howard further acknowledged that, at the time he issued the letter of warning to Mrs. McCollum in his office, he may well have said, as Mrs. McCollum testified, that she had been called in to the office because of the letter she wrote to the Postmaster General.

57. The United States Post Office Report of Investigation on Mrs. McCollum's discrimination complaint contains as Exhibit 5 a note

from Paula Carter to Charlene McCollum dated 5-27-80 giving permission to leave Sharon Stephens' mail in her mailbox. This note, written some 6 weeks after tne customer compiaint, was Mrs. McCollum's first notice that Sharon Stephens was to receive mail at Ms. Carter's address.

58. Mr. Emerson agreed that the insubordination charges were based on failure to follow instructions rather than on impudence or similar conduct. He also agreed that the conduct set out in the removal notice was the basis for both categories of charges, insubordination as well as failure to follow instructons.

59. Mr. Emerson discussed the proposed removal with the Postmaster, his immediate supervisor, before he issued the notice. Mr. Howard concurred, as he must before any removal action is taken at the Rome Post Office.

60. According to the National Agreement between the United States Postal Service and the National Rural Letter Carriers Association, discipline in the Postal Service is to be corrective rather than punitive. For this reason discipline is to be progressive for all but the most serious offenses. The Postmaster set out the appropriate progression as 3 day suspension, 5 day suspension, 10 day suspension and removal. Some offenses, such as those endangering life and property, would be exceptions to the normal progression; however there is no contention that Mrs. McCollum's offenses were of such a nature. It is undisputed that, other than the 1980 warning letter, no disciplinary action was taken against Charlene McCollum until her removal, which was later converted to a 78-day suspension through the efforts of the National Rural Letter Carriers Association.

61. The United States Postal Service Report of Investigation on Mrs. McCollum's discrimination complaint at page 8 compares the treatment of Mrs. McCollum with that of four male employees within the post offices encompassed in the Atlanta Sectional Center. Plaintiff's Ex. 57. This comparison indicates that plaintiff was removed for failure to follow instructions with a past record of one warning letter and no suspensions while male employee A was removed for failure

to follow instructions with a past record of three warning letters (one for failure to follow instructions) and six suspensions (five for failure to follow instructions: seven days, ten days, five days, fourteen days, fourteen days); male employee B was removed after five suspensions, four for failure to follow instructions (seven days, fourteen days, fourteen days, fourteen days); male employee C was removed after three letters of warning and five suspensions, two for failure to follow instructions (seven days and seventeen days); male employee D was removed after four letters of warning, two for failure to follow instructions.

62. In comparison within the Rome Post Office, the record shows that only one employee other than Charlene McCollum was removed by Mr. Howard. This was D.M. Jones, a male, who was removed for failure to come to work. Mr. Jones was removed after accumulating approximately 20 offenses of failure to come to work and after being given a three day suspension, a five day suspension and a ten day suspension, all for failure to report to work.

63. Graham Grimes, an employee who was not removed, was given letters of warning on June 27, 1983 and July 8, 1983 for failure to follow instructions and then suspended for three days in August, 1983 for the same offense.

64. At the time of the incidents complained of by Charlene McCollum and Tony McCollum and at least up to the time of the administrative hearing in the Charlene McCollum case, September, 1982, Mr. Howard acknowledged that the Rome Post Office kept an unofficial folder on each employee, filed alphabetically by name of employee, containing letters, complaints and other material relating to the employee. These files were available to all supervisors when action was being taken or contemplated involving an employee.

65. Mrs. McCollum denied from the stand that an incident had ever taken place between herself and postal patron Nell Gilliland. Ms. Gilliland testified, not only about the very unpleasant incident in the Belk's Department Store where she worked with Mrs. McCollum, but also about a later incident with Mrs. McCollum in July 1983 at Ms.

Gilliland's home. This later encounter frightened Ms. Gilliland so that, upon her husband's advice, she made contemporaneous notes of it. Mrs. McCollum resumed the stand, after Ms. Gilliland, to admit that an incident in Belk's did take place. She went on to testify, in the face of Ms. Gilliland's testimony, that she went to Belk's to talk to Ms. Gilliland about her mail service and was told by Ms. Gilliland "you are my salvation" and was complimented by Gilliland on the improvement in mail service since Mrs. McCollum started carrying the route. When Mrs. McCollum approached Ms. Gilliland at Belk's Department Store Ms. McCollum was cold and aggressive. She told Ms. Gilliland that if mail was missing it was probably the fault of Sheila Williams who was old. The second incident was when Ms. Gilliland was approached at her home by Mrs. McCollum.

66. The conduct of Mrs. McCollum and her son Tony has been highly unusual. They taped openly and surreptitiously not only management officials, but union officials and co-employees as well. The family has a speaker phone at their residence, which has been used by the family to group around so that they can overhear and "witness" phone conversations made to others.

67. Mrs. McCollum complains that both management and the union failed to accept her grievances. It was uncontested that a rural carrier may file a Step 1 grievance, the first stage of a grievance, by himself or herself. Union officials unanimously testified that if the grievance did not involve a disciplinary matter, it was the rural carrier's responsibility, not the Union's, to take the first step. After that stage, the grievance belongs to the Union, which decides whether to pursue it. Many times both Mrs. McCollum and her son, Tony, demanded the union file the Step 1 grievance for them. When the Union thought a grievance was without merit and refused to initiate the grievance process, the McCollums dropped it, rather than pursue it on their own. At trial, however, they complained that these instances were evidence of the union's hostility toward them.

68. Mrs. McCollum wanted Mr. Howard to apologize to her over the light incident at her mail case.

69. Mrs. McCollum refused to accept certified mail to her from the Postal Service.

70. Mrs. McCollum testified that Mr. Howard extracted a kiss from her in return for his assistance in the lighting incident. The Court does not find this testimony credible.

71. On October 29, 1979, six days after Mrs. McCollum's son, Timothy McCollum, and daughter, Vickie Dorsey, had applied for jobs at the postal service, an anonymous letter was written to management officials in Atlanta, Georgia. The letter was written about June Moyer. Tony McCollum and June Moyer were having difficulties in their relationship as substitute and regular rural carrier. Mrs. McCollum had been told by the Postmaster that he was not inclined to hire her two children. Mrs. McCollum had previously harassed Ms. Moyer with gossip and confrontation. This letter claimed that June Moyer suffered from an inner ear problem that would cause her to blackout without warning, that she was probably setting up the post office for a disability claim, and that she was a danger to pedestrians and other drivers on her route as a result of this condition. It was signed "a loyal employee." Although Tony and Charlene McCollum deny that they had anything to do with this letter, John King, June Moyer and other employees thought otherwise.

72. The style of the letter of October 29, 1979 and that written by Charlene McCollum to the Postmaster General in April 1980, which she did sign, are similar enough in style to draw a reasonable inference that they share the same author. The surrounding facts and dates also support such an inference.

73. Other postal employees made some of the same mistakes that Mrs. McCollum made, but, unlike her, they agreed to correct their behavior when management called it to their attention. When they continued to disagree with management's approach, the others obeyed the well accepted principle that they should obey orders first and grieve later. Mrs. McCollum refused to follow any instructions given by management which were not to her liking.

74. The plaintiff's removal was compromised to a 78-day suspension through the grievance procedure available under the collective bargaining agreement between the Union and the Postal Service.

75. John King was local union steward for defendant, National Rural Letter Carriers Association, in the Rome Post Office from 1971 to 1981. As local steward he is the first point of contact for a rural letter carrier wishing to file a grievance against Postal Service management. The employee could initiate the first step of the grievance process without Union participation if desired. No grievance can be carried beyond Step One by an employee. Only the Union can do this.

76. According to the National Rural Letter Carriers Association Steward's Manual, "the role of the Steward is to represent the Rural Carrier Craft Employee rather than to act as an impartial judge." In cases where the Steward does not know if a legitimate grievance exists, the Association "encourages the Steward to give the benefit of the doubt to the Craft Employee and process the complaint."

77. Section III of the Manual further provides that "In a questionable grievance case the Steward should consult with the State Steward or the NRLCA Regional Representation before refusing to process the matter . . . In cases where the Craft Employee is dissatisfied with the explanation it should be explained that the employee may take the problem to the NRLCA Regional Representative for a decision on whether to process the case . . ." Both Charlene McCollum and Tony McCollum testified that no Union repesentative ever told them of their right to take such problems to the Regional Representative. It was evident at trial, however, that both Charlene McCollum and Tony McCollum were fully familiar with all their rights under the contract.

78. Mr. King admitted that he does not like Charlene McCollum and believes the feeling to be mutual. Mr. King told both Charlene McCollum and Tony McCollum that he would not represent them in the grievance process. He told Tony McCollum in 1978 that he would not represent him in a grievance because he had problems with Charlene McCollum and did not want to get involved with another

member of the McCollum family. Mr. King took this action after Mrs. McCollum accused him of accepting a bribe from Mr. Howard. He immediately arranged for other Union representation for both Charlene McCollum and Tony McCollum.

79. On February 5, 1981 Mr. King wrote a letter to the National Rural Letter Carriers Association president Dean King concerning Charlene McCollum. In that letter, Mr. King stated that Charlene McCollum "has over the past few years caused nothing but trouble in our office. It is a long story and Dallas has a complete file that was given to him at SCA on her."

80. Mr. King stated to another rural carrier, Graham Grimes, that he would not represent Charlene McCollum or Tony McCollum and also, when Charlene McCollum had been removed from her position n 1981, that in his opinion, Charlene McCollum would never set foot in the Rome Post Office again.

81. State Steward Alvin Downs, who was asked by Mr. King to represent the McCollum family instead of Mr. King, their local steward, acknowledged that it was unusual to substitute a state steward for a local steward in representing employees. Mr. Downs also stated that he has a high regard for John King and feels that Mr. King is very conscientious.

82. In 1981 Mr. Downs refused to sign a Step One grievance on behalf of Charlene McCollum in connection with the reduction in her rural route. His stated reason was that the Union will not initiate a Step One grievance unless it is a class grievance. It was undisputed that this was the general practice of the Union.

83. The National Agreement and the Association's Steward's Manual state that the Union may initiate a nondisciplinary grievance at Step One and may initiate a class grievance at Step One.

84. Charlene McCollum filed a grievance on her removal from the Postal Service in April, 1981. The grievance was pursued by the Association to the aribtration stage. Under the National Agreement

the Union had the right to settle or compromise the grievance at this stage without the consent of the grievant. However, Charlene McCollum and Tony McCollum testified that Union officials Alvin Downs, Steve Smith and William Peer promised that they would not compromise the grievance without Charlene McCollum's approval. They then did compromise the grievance without her approval, agreeing to a 78 day suspension for Mrs. McCollum in lieu of removal.

85. On most occasions when either Tony McCollum or Charlene McCollum has been called to the Postmaster's office in connection with complaints or disciplinary matters, a Union official has been present at the request of the Postmaster.

86. On June 29, 1982 John Chandler succeeded John King as National Rural Letter Carriers Association local steward for the Rome Post Office. He was asked by Mr. King if he wanted to become local steward. His name was presented to the employees who then voted yes or no. There were no other candidates nor was the election conducted by secret ballot. Mr. Chandler was elected as local steward in that election.

87. Mr. Chandler testified that he has high regard for John King's judgment and has consulted unofficially with Mr. King on the handling of some of the grievances filed by the McCollums. Although at the time Mr. Chandler consulted Mr. King, Mr. King was an Area Steward, he acted as such for an area not including the Rome Post Office. There is no evidence that Mr. King ever gave poor advice or showed any animosity against the McCollums in any advice to Mr. Chandler.

88. Another Rural Carrier, Graham Grimes, testified that Mr. Chandler is not as open about not representing someone as Mr. King was. If he disagrees with an employee on a grievance, he doesn't say that he is not going to represent the employee, he just drops the grievance.

89. In 1982 Charlene McCollum filed a grievance over the posting or awarding of Rural Route 10. The union withdrew the grievance after deciding that the posting of Route 10 was done correctly. The

union also expressed that opinion that the 1981 posting of Route 1 in a different manner may have violated the contract but that the time for filing a grievance on that had expired. Mrs. McCollum testified that she had asked Union Steward John King in 1981 to file a grievance on the posting of Route 1, and he refused. Mr. Chandler acknowledged in his testimony that the posting of rural route vacancies affected all rural carriers.

90. In November, 1982 Charlene McCollum requested that Mr. Chandler assist her in a grievance alleging that Postal Service management condoned and refused to stop the harassing of Mrs. McCollum by a fellow employee. Mr. Chandler refused to file such a grievance. He did file a harassment grievance on Mrs. McCollum's behalf the next month, December, 1982. That grievance was resolved by management agreeing to take the necessary steps to see that such harassment did not occur again. Mrs. McCollum initiated a grievance charging management with allowing the existence of unpleasant working conditions. After denial at Step One, Mr. Chandler changed the wording of the grievance from "unpleasant" to "unhealthful" working conditions and then withdrew it because of his stated opinion that there was not enough evidence of unhealthful conditions. According to the testimony of John King, Mr. Chandler discussed this grievance with him.

91. The National Agreement then in effect, defined a grievance as "a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment."

92. Mr. Chandler testified that he changed the grievance to charge unhealthful conditions in an attempt to bring the grievance into the contract. When shown that portion of the United States Postal Service Employee and Labor Relations Manual which deals with an employer's duty not to create unpleasant working conditions, he stated that he was unfamiliar with that provision and that Mrs. McCollum should have called it to his attention.

93. Postmaster Betty Stone of the Silver Creek Post Office testified that on January 4, 1983 Mr. Downs and a Postal Service official, Richard Wiese, came to her post office to listen to a tape recording made by a

grievant of a conversation between Ms. Stone and the grievant. Ms. Stone testified she asked Mr. Downs and Mr. Wiese to sign a document stating that the tape was made without the Postmaster's knowledge and that Mr. Downs wanted the Postal Service official to listen to the tape. She further testified that they refused to sign the document, and Mr. Downs became angry and told the Postmaster that he knew where she had gotton such a document, "from that old woman in Armuchee or her son." After viewing the witness and hearing this testimony the Court does not consider the testimony of Ms. Stone credible upon this issue.

94. Mr. Downs denies making that statement, and Mr. Wiese testified that he did not hear any such statement. However, Mr. Wiese also testified that he could not be sure he heard everything said between Ms. Stone and Mr. Downs. Defendants also attempted to cast doubt on Ms. Stone's testimony by showing that she was a friend of the McCollum family and attempted to hire Charlene McCollum's daughter, Vickie Dorsey, for the Silver Creek Post Office when there was allegedly no approved position available.

Ms. Stone tesified that the clerk position which she sought to fill was initially authorized by higher authority and only later cancelled. She produced two preprinted time cards prepared for Vickie Dorsey by the Postal Data Center and sent to the Silver Creek Post Office before the position was cancelled. She also testified that Ms. Dorsey was listed first on a hiring register furnished to her by the Atlanta Sectional Center, immediate superior office of both the Rome Post Office and the Silver Creek Post Office, and that she had been instructed by Sectional Center officials to pick the first person on a register unless she had good reason not to do so.

96. In 1984 the union requested that management furnish each rural carrier in the Rome Post Office with an opportunity to review his or her official personnel file. All such files were sent from the Atlanta Sectional Center to Rome except that of Mrs. McCollum. When Mrs. McCollum initially approached Mr. Chandler about filing a grievance over this, he encouraged her to wait and see whether management would be successful in locating her file. Later he suggested to Mrs.

McCollum that she file a grievance and he initiated a Step One Grievance for her. Apparently her file has been lost.

97. Any animosity of Mr. King toward the McCollums commenced when Mrs. McCollum accused him of accepting a bribe from the Postmaster, Mr. Howard, when Mr. King received a $200.00 merit award. Immediately after this accusation Mr. King took the extraordinary step of having Mrs. McCollum and her children represented by higher officials in the association.

98. Mr. King's successor as local steward, Mr. Chandler, was not influenced by any past or continuing animosity toward Mrs. McCollum or any member of her family. He maintained a strict neutrality in the personality disputes at the Rome Post Office.

99. Direct evidence of Mr. Chandler's impartiality and lack of discrimination are the following: (1) the evidence establishes that Mr. Chandler favorably represented Mr. Graham Grimes, a McCollum supporter in this action, in three disciplinary actions in 1983, and was successful in obtaining lesser penalties in all cases. (2) Mr. Chandler succeeded in correcting a problem Tony McCollum had about the relocation of his mail-sorting case. While Mr. McCollum testified that the problem was not corrected quickly enough, two working days, the evidence also shows the corrective actions taken by Mr. Chandler. There is no evidence that the time delay, if any, was in any way attributable to Mr. Chandler or to animosity on his part. (3) In October, 1984, Mr. Chandler was instrumental in getting three letters of warning against Tony McCollum removed from his personnel file, all of which involved serious allegations of wrongdoing, including speeding while driving on the route, possession of a hand gun while serving the route, and improperly curtailing the mail. Mr. McCollum disputed at trial the validity of the charges in the first instance, and claims that they were filed as acts of harassment and discrimination against him. Mr. Chandler agreed with Mrs. McCollum's side of the issues, and presented during the grievance processing the very defenses and arguments raised by Mr. McCollum's attorney at trial. Mr. Chandler, in fighting to obtain consideration for Mr. McCollum by getting an extension of time to keep one of the grievances from being untimely,

risked a five-day suspension from Postmaster Howard. (4) Mr. Chandler has, on his own initiative, sought to create a more harmonious work situation at the Rome Post Office and to ease the tensions there by counseling other employees on several occasions. Additionally, he has had discussions with management officials concerning ways of reducing and eliminating entirely acts of alleged harassment against the McCollums by management personnel and by the employees alike.

100. Mr. Chandler's handling of Charlene McCollum's grievance concerning harassment by fellow employees, and her complaint about the car-denting incident, the only one within the six-month period at issue before the Court, was fair, reasonable, and nondiscriminatory. His decision not to go forward with her "harassment" claim was based upon a reasonable interpretation of the applicable collective bargaining agreement and Postal Service regulations. The fact that Mr. Chandler chose not to rely upon her terminology, i.e., "unpleasant working conditions," has no bearing on the matter, because his choice was based upon a previous grievance he had successfully pursued for her and upon another Postal Service manual provision relating to "healthful" working conditions which arguably is better suited to the situation. Even if it could be found that Mr. Chandler's decision in this regard was an error, and that he should have pursued this grievance in order to end the harassment of Mrs. McCollum, his error was an innocent one, not based upon improper motive, invidious reasons, or discriminatory purpose.

101. The car denting incident/harassment event occurred in the post office parking lot, was a minor incident and did not involve either the postal service or the National Rural Letter Carriers Association.

102. Mrs. McCollum appears to allege a second incident within the six months period applicable to this case. This relates to the posting of Route #8. Nothing was made of this second incident when she opposed the Defendant Association's Motion For Summary Judgment. The Court addressed the motion as if there remained only one issue, the harassment/car denting incident, in its Order of May 28, 1984. The evidence establishes that Mr. Chandler's decision not to proceed with this grievance was predicated on a sound, contractually based

reason. The collective bargaining agreement allows for an extension of the posting of a route if the route qualified for an interim adjustment. Route 8 did qualify for such adjustment. The posting rules affected all carriers alike. Assuming Mr. Chandler's decision to drop the case was error, Mrs. McCollum and all other Rome carriers were similarly affected.

103. Mr. Chandler was the local association steward during the six month period Mrs. McCollum's claims are made against the defendant, National Rural Letter Carriers Association.

104. Mrs. McCollum, Mr. McCollum, Postmaster Howard and Mrs. Howard frequently visited together and would have dinner together until Mr. Howard failed to hire Mr. and Mrs. McCollum's children, Timothy McCollum and Vickie Dorsey.

105. The plaintiff, Tony McCollum, is a male and is employed by the United States Postal Service, assigned as a rural carrier to the Rome, Georgia Post Office. At all times material to the claims made by Tony D. McCollum, the Postmaster at the Rome Post Office was George T. Howard.

106. In April, 1981, due to the removal of his mother, Charlene McCollum, from her position with the Postal Service, Tony McCollum, then a substitute rural carrier, carried her vacant route on a full-time basis. For the first few weeks he carried the route 6 days per week, earning overtime pay for the sixth day each week.

107. In May, 1981, the Postmaster wrote a letter to Tony McCollum stating that he was being assigned a substitute each Wednesday, effective the following Wednesday, May 20, 1981. This letter was sent certified, return receipt requested, to Tony McCollum on the workroom floor at the Rome Post Office. Tony McCollum refused the letter. On July 5, 1980 Tony McCollum had received a letter from the Postmaster, dated June 27, 1980, switching his route assignment effective July 7, 1980. This letter was received on the workroom floor.

108. This was not a usual way of communicating instructions

to an employee. The Postmaster was critical of Tony McCollum for refusing to accept this letter and acknowledge that he has refused mail addressed to him at the Post Office. It is not surprising that Mr. Howard thought it wise to communicate with Tony McCollum in writing.

109. Tony McCollum testified that he was not told of the substitute and the day off by any member of Postal Service management before May 20, 1981. The Postmaster testified that he verbally told Mr. McCollum of this assignment. The subsequent warning letter given to Mr. McCollum for coming to work when he was told to be off does not mention any verbal instructions.

110. Mr. Howard testified in Tony McCollum's administrative hearing that he is aware that supervisors are to put in letters of warning exactly what took place. In this case, he just "failed to put it in" that he verbally instructed Tony McCollum on the assignment of a substitute. At the trial Mr. Howard also testified that his subordinate supervisor, Mr. Couey, also told Tony McCollum about the day off. Mr. Howard acknowledged that he did not mention Mr. Couey's involvement in his testimony at Mr. McCollum's administrative hearing. Mr. Couey did not testify at that hearing or in the trial herein.

111. Mr. McCollum testified that he was told by fellow employee Jane Green on Monday, May 18 that she was to be his substitute, effective the following Wednesday. He testified he then asked his supervisor Mr. Emerson about the assignment of a substitute. Mr. Emerson stated that he knew nothing about it. Mr. Emerson did not testify at the administrative hearing on Mr. McCollum's complaint but testified before this Court and stated then that he did not recall Mr. McCollum asking him this.

112. Mr. McCollum saw both Mr. Emerson and the Postmaster the next day but neither gave him any instructions on that day about assignment of a substitute or an off day.

113. Mr. McCollum called Jane Green the night before she was to substitute for him. He testified that he told her that he would have to go in the next day since no one in management had told him not

to, but that she should obey her orders and go in also. He further testified that he told Ms. Green that he expected she would carry the mail on his route the next day.

114. At the trial herein Ms. Green testified that Mr. McCollum had told her not to go in on that Wednesday. She acknowledged that in her testimony at the February 3, 1983 administrative hearing on this matter she testified to several different versions of the conversations between her and Mr. McCollum, including stating that she simply did not recall what was said during the conversation. She said that since that time she has had more time to consider the matter and that she now remembered it more clearly than she did in 1983.

115. David McCollum, Postmaster at Armuchee, Georgia and father of Tony McCollum, testified that he was present in the McCollum home during his son's conversation with Ms. Green by telephone and that Tony McCollum did not tell Ms. Green not to come in the next day. Charlene McCollum testified to the same effect.

116. On May 20 both Jane Green and Tony McCollum reported to work. Ms. Green carried the mail on Mr. McCollum's route, receiving pay for her day's work. The Postmaster sent Tony McCollum home, telling several people assembled in his office that Tony McCollum had disobeyed instructions and had also told Jane Green not to come in. Tony McCollum was not paid for that day. Tony McCollum's telephone call to Jane Green on the evening of May 19, 1981 is clear evidence that he knew he was not to work on the following day, May 20, 1981.

117. The EEO complaint made by Tony McCollum against the Postal Service was the 1981 charge relating to the warning letter from Mr. Howard to him on May 21, 1981 and other circumstances surrounding his carrying of his mother's mail route while she was removed.

118. At the time Mrs. McCollum was removed from her job Tony McCollum was her substitute. He began carrying the route temporarily, full time, six days per week, and earning overtime for the sixth day.

119. The payment of overtime for the sixth day of work to Mr. McCollum was not economical for the post office.

120. Mr. Howard assigned Jane Green, who as a prior substitute on this route was already familiar with the route, to substitute for Tony McCollum one day a week so that he would be working only five days and with no overtime pay for delivery on the sixth day.

121. Jane Green was already substituting for another regular rural carrier on Saturday. She could not substitute on Saturday for Tony McCollum so as to allow him to have Saturday as his off day.

122. He complained that the refusal to let him work six days and to give him Saturday as an "off day" was sexually motivated and motivated by reprisal.

123. While regular rural carriers have the right to select their off day, substitute carriers have no such rights. Female substitutes had similarly been relieved of their sixth day when relief was available.

124. Tony McCollum could not have Saturday as an off day because Jane Green was already substituting on Saturday for another regular carrier.

125. When Mr. Howard gave Tony McCollum verbal instructions not to report on Wednesday, because Jane Green was going to deliver his mail for him on Wednesdays, since Tony McCollum had ignored verbal instructions in the past, Mr. Howard also sent him instructions by certified mail.

126. The version the Court accepts as to the telephone conversation between Ms. Green and Tony McCollum on the Tuesday evening before she was to first work his route on Wednesday is that he called her on Tuesday night and told her that he was going to work on Wednesday. That he was not telling her what to do about reporting to work on Wednesday morning, but that he was going to work the route. Ms. Green responded that she had been told to report to work and she was going to do so. Ms. Green called Mr. Howard that

evening, reported the telephone call to Postmaster Howard and was told to do as she had been instructed.

127. Dorothy Hubbard testified that in 1979-80 she served a vacant route for approximately 8 months without a substitute, except for a two or three day period when she was sick. Faye Evans, another female rural carrier, served a vacant route for 5 months, the first 3½ months without a substitute. When she received a substitute it was at her own request. After being assigned a substitute she had Saturday as her day off. June Moyer, John King and Graham Grimes all testified that when Mr. Grimes was hired as a substitute for Ms. Moyer, her assigned day off was also Saturday. Jane Green was assigned as a substitute for Tony McCollum because she knew the route and she was at that time carrying another route on Saturday.

128. At the administrative hearing on Tony McCollum's discrimination complaint, Mr. Howard testified that, when he assigned a substitute to Tony McCollum, he could have given him Monday, Tuesday, Thursday or Friday off. He did not discuss with Tony McCollum which day he would like to have. Mr. Howard testified that he does not usually schedule an off day for rural carriers, that he usually lets them pick their own day but that he "just didn't have the time" to let Tony McCollum pick his off day. Mr. Howard further testified that he has never chosen the off day for any substitute other than Tony McCollum.

129. Mr. Howard also testified at the administrative hearing that he has never on any occasion had an employee come to work when the employee had been instructed not to do so with the exception of the Tony McCollum incident.

130. Beginning in March, 1981 and extending for several months thereafter, plaintiff represented his mother in two EEO complaints filed against the Postmaster. Tony McCollum testified that he and his mother conferred with EEO counselor Jimmy Fleming about her discrimination complaints.

131. The United States Postal Service Report of Investigation

of Charlene McCollum's removal complaint contains her informal complaint which shows Tony McCollum as her representative and reflects that he and Charlene McCollum initially met with the EEO counselor on March 25, 1981 with the final interview on April 9, 1981. The informal complaint also reflects that the counselor, Jimmy Fleming, met with the Postmaster some time between these two dates in an effort to resolve the complaint.

132. The informal complaint on Charlene McCollum's route reduction also identifies Tony McCollum as her representative, indicates that the first contact with the EEO counselor was April 20, 1981 and indicates that the counselor interviewed Mr. Howard on May 4, 1981.

133. Mr. Howard testified that he did not know that Tony McCollum was representing his mother in her EEO complaints at the time he assigned a substitute to him and issued him a warning letter. He also said, however, that he would not have been surprised to learn that Tony McCollum was so doing.

134. David McCollum, the husband of Charlene McCollum, testified at Tony McCollum's administrative hearing that Mr. Howard holds a grudge and has a negative attitude toward the EEO program.

135. John King was local union steward for defendant, National Rural Letter Carriers Association, in the Rome Post Office from 1971 to 1981. As local steward he was the first point of contact for a rural letter carrier wishing to file a grievance against Postal Service management. The employee could initiate the first step of the grievance process (a discussion with the immediate supervisor) without union participation if desired; however no grievance can be carried beyond Step One by an employee. Only the Union can do this.

136. According to the National Rural Letter Carriers Association Steward's Manual, "the role of the Steward is to represnt the Rural Carrier Craft Employee rather than to act as an impartial judge." In cases where the Steward does not know if a legitimate grievance

exists, the Association "encourages the Steward to give the benefit of the doubt to the Craft Employee and process the complaint."

137. Section III of the Manual further provides that "In a questionable grievance case the Steward should consult with the State Steward or the NRLC Regional Representative before refusing to process the matter . . . In cases where the Craft Employee is dissatisfied with the explanation it should be explained that the employee may take the problem to the NRLCA Regional Representative for a decision on whether to process the case . . ." Both Charlene McCollum and Tony McCollum were well versed in all their rights through the Union and under the contract between the Union and the Postal Service.

138. Mr. King readily admits that he does not like Charlene McCollum and believes the feeling to be mutual. This overt hostility has apparently existed for some years. Mr. King told both Charlene McCollum and Tony McCollum that he would not represent them in the grievance process. He told Tony McCollum in 1978 that he would not represent him in a grievance procedure because he had problems with Charlene McCollum and did not want to get involved with another member of the McCollum family. Mr. King agrees that his relationship with the McCollums was one of dislike, animosity and hostility. He further states that he tried not to let those feelings influence him but that he could not help but be influenced by them. Accordingly, he arranged that they be represented by other Union officials.

139. Mr. King stated to another rural carrier, Graham Grimes, that he would not represent Charlene McCollum or Tony McCollum and also, when Charlene McCollum had been removed from her position in 1981, he expressed the opinion that Charlene McCollum would never set foot in the Rome Post Office again.

140. Mr. King testified that, when he told Charlene McCollum and Tony McCollum that he would no longer represent them, he also told them that State Steward Alvin Downs, who resided in Mitchell, Georgia, near Augusta, would represent them when necessary. Mr.

King made this arrangement. When Tony McCollum received a letter of warning from the Rome Postmaster on May 21, 1981 for failure to follow instructions, Mr. King, at Mr. Downs' request, agreed to represent Tony McCollum. Mr. Downs' reasons for requesting that Mr. King represent Mr. McCollum were that the Union wanted this grievance procedure to be as near correct as they could get it and that Mr. King, being on the scene, could write a better grievance.

141. State Steward Alvin Downs, who was asked by Mr. King to represent the McCollum family instead of their local steward, Mr. King, acknowledged that it was unusual to substitute a state steward for a local steward in representing employees. Mr. Downs also stated that he has a high regard for John King and feels that Mr. King is very conscientious.

142. The importance of local representation for employees is illustrated by the Associations' Steward's Manual, which provides:

> "Early involvement by the steward may head off a carrier from taking a problem to the supervisor which has no merit and which may serve only to antagonize management without gaining anything. Also, early involvement by the steward may assure accuracy in the statement of the grievance, the precise violation involved and successful prosecution of the grievance."

There is no evidence the McCollums suffered in any way from any violation of this provision in the manual or that it was in fact violated by the Union.

143. After Tony McCollum's Step One grievance on the letter of warning was denied by management, Mr. King prepared a Step Two grievance citing certain violations of the National Agreement. Tony McCollum also prepared a Step Two grievance citing additional provisions of the National Agreement. Mr. King declined to use Mr. McCollum's grievance.

144. In September 1981, Mr. Downs represented Tony McCollum at the Step 2-B hearing on this grievance. A primary issue

in that grievance was whether Mr. McCollum ever actually received the instructions not to report to work. The instructions were contained in a certified letter which the Postmaster sent to Mr. McCollum on the workroom floor of the Rome Post Office. Without being aware of the letter's contents, Mr. McCollum refused delivery. He testified that this refusal was due to a "bad experience" he had had earlier involving the receipt of mail from the Postmaster at Mr. McCollum's work place. Prior to the hearing Mr. Downs told Mr. McCollum that Union Official Steve Smith had called him from Oklahoma and asked if Mr. Downs needed him to fly in and assist in the grievance and that he told Mr. Smith, no, this one was so easy that he could handle it by himself and no help was needed. Mr. Downs also told Mr. McCollum not to worry, that they had the grievance won "hands down." At the hearing, Mr. Downs agreed with Postal Service official Rick Spathelf that Mr. McCollum was wrong in not accepting the certified letter. Mr. Downs then acknowledged that the letter of warning should remain in Mr. McCollum's official personnel file. Mr. Downs and Mr. Spathelf then agreed that the warning letter would remain in Mr. McCollum's official personnel file. Mr. Downs and Mr. Spathelf then agreed that the warning letter would remain in Mr. McCollum's file for 6 months. In actuality, through an apparent oversight, the letter remained there for almost a year longer, when it was removed through the efforts of Mr. McCollum and his attorney. The failure to remove the letter of warning, however, was an oversight of the Postal Service and not the fault of the association or any official thereof.

145. Mr. King was in the Postmaster's office on June 21, 1981 when the Postmaster gave Mr. McCollum a letter of warning for coming to work when he was scheduled to be off. Mr. King was not in the office at Mr. McCollum's request. Mr. King stated that he was there to protect the Union's interest. The Postmaster had asked Mr. King to be there. Mr. Howard generally has a Union official present on such occasions.

146. On numerous occasions when either Tony McCollum or Charlene McCollum has been called to the Postmaster's office in connection with complaints or disciplinary matters, a Union official has been present at the request of the Postmaster. This was Mr. Howard's

general practice with all such incidents whether or not the McCollums were involved.

147. In the summer of 1981 other Postal employees told Mr. King of certain derogatory comments allegedly made about him by Tony McCollum. Mr. King assumed that Tony McCollum made such remarks. Mr. King also stated in his deposition filed with this Court that "I had as little to say to Tony and Mrs. McCollum as I possibly could." Mr. King also believed that Charlene McCollum wrote an anonymous derogatory letter about another Postal employee and that the McCollum family was responsible for certain abusive phone calls made to his home. Both Charlene McCollum and Tony McCollum denied any connection with the letters or the phone calls.

148. In 1981 Tony McCollum served a vacant rural route for over 90 days. During that time he learned that, after serving a vacant route for over 90 days, a substitute becomes eligible for paid sick and annual leave retroactive to the first day. He discussed this with Postal Service management and was told that he was not entitled to paid leave. Mr. McCollum told John King about this but Mr. King would not assist him. Mr. McCollum then took leave for which he was not paid because he was a substitute. Later through his own efforts and those of his attorney, the Postal Service gave Mr. McCollum additional leave days, although not money, to cover the leave which he earned during the period he served the vacant route. This was after Mr. Downs was looking after the McCollums in their grievances.

149. On June 29, 1982 John Chandler succeeded John King as National Rural Letter Carriers Association local steward for the Rome Post Office.

150. In March or April, 1982 Tony McCollum filed and won a grievance concerning which labeling system to use on his Route 11 case He testified that even after he won the grievance, management would not tell him which labeling system to use and that Mr. Chandler would do nothing to get a clarification from management. After Mr. McCollum's attorney wrote management official Joe Emerson concerning the grievance, Alvin Downs cam to Rome and obtained a

revised decision from Mr. Emerson. Even after this, Mr. Downs suggested that Mr. McCollum use both systems. He spent some time trying to convince Mr. McCollum to use both labeling systems, the very thing over which Mr. McCollum had just filed a successful grievance. The change in the labeling system came about through management because the county had just completed a numbering system for all houses in the county.

151. On June 16, 1983 Tony McCollum filed a grievance because of management's action in withholding money from his wages. When the grievance was turned down at Step One, Mr. McCollum asked John Chandler to take the grievance to Step Two and understood that he would do so. Later, when Mr. McCollum asked Mr. Chandler about the progress of the grievance, Mr. Chandler stated that he had not taken the grievance to Step Two and that, in his opinion, Mr. McCollum did not have a grievance. By this time it was too late to take the grievance to Step Two. Tony McCollum owed the money to the Postal Service as a result of his having obtained an advance on his salary which he had not repaid.

152. On November 17, 1983 Tony McCollum filed a grievance over management's refusal to accept his recommendation for a Rural Carrier Relief employee to be employed on his route. Under the 1981-84 National Agreement, Rural Carrier Relief is the description given to substitute carriers. The process for hiring such employees, also a change from prior procedure, involves a recommendation by the rural carrier needing a substitute and subsequent hiring by the Postmaster based on the recommended individual's acceptable character and fitness.

153. Tony McCollum, being without a substitute, recommended his sister Vickie Dorsey for his Rural Carrier Relief. The Postmaster turned down the recommendation for the reason that postal regulations prohibit a rural carrier from recommending a relative for employment. Since such regulations predated the 1981-84 National Agreement, Mr. McCollum filed a grievance on the subject contending the National Agreement gave him the right to make such recommendation of his sister.

154. The Union withdrew the grievance for the stated reason that the nepotism regulations, predating the National Agreement, applied to the hiring of Rural Carrier Reliefs. On February 23, 1984 and subsequent to the 1983 grievance the Atlanta Sectional Center received a message from the Regional Postmaster General to all Postmasters clarifying and reiterating the position of the Postal Service that "there is no prohibition or control on the hiring of rural carrier relief employees."

155. Alvin Downs testified that he believes that the nepotism rules do apply to RCR recommendations by rural carriers but feels that it is appropriate for a relative to be hired as RCR if the rural carrier does not recommend the relative. On December 6, 1983 Mr. McCollum wrote the Postmaster again asking for an assignment of a Rural Carrier Relief but this time specifically not recommending anyone. In that letter Mr. McCollum identified Vickie Dorsey and his brother Timothy McCollum as two people who were on a substitute rural carrier register and who would be acceptable to him. Neither were hired.

156. Shortly after the Union withdrew Tony McCollum's grievance on the Postmaster's refusal to hire Vickie Dorsey as his Rural Carrier Relief, Tony McCollum asked John Chandler to file a grievance because the Postmaster refused to hire Timothy McCollum, Tony McCollum's brother, who was available and acceptable but had never been recommended by Tony McCollum. John Chandler refused to do so. Mr. Chandler did, however, let Mr. McCollum know of the availability of Mr. Chandler's cousin, Dwayne McKelvey, as a possible Rural Carrier Relief.

157. On November 26, 1983 Tony McCollum filed a grievance on management's requiring him to purchase stamps for customers only at the Rome Post Office, a requirement which he considers to be a violation of Postal Service regulations. Initially Mr. Chandler agreed with Mr. McCollum and initiated a grievance with John King. Mr. Chandler reversed his decision and refused to pursue the grievance, calling it stupid and calling Mr. McCollum petty and bullheaded. Tony McCollum had been purchasing stamps from his father's post office

at Armuchee, Georgia.

158. In 1984 Tony McCollum approached John Chandler about filing a harassment grievance against management for some incidents which had all taken place in a short period of time in the fall of 1984: the issuance of Tony McCollum of four letters of warning (three of which were issued on the same day); the threat by a supervisor to put Tony McCollum on restricted sick leave and the moving his mail case to a location which Mr. Chandler agreed was unsafe. Mr. Chandler refused to file a harassment grievance, stating that it would be of no use unless they had witnesses who heard management officials say that they were doing these things to harass Mr. McCollum. Mr. McCollum said he might file the grievance himself. Mr. Chandler stated that he could do so but that it would not go anywhere.

159. On December 17, 1982 the Association had filed a harassment grievance on behalf of an employee of the Silver Creek Post Office regarding an incident to which testimony indicated there were no witnesses except the grievant and the management official accused of the harassment.

160. Tony McCollum alleged three claims against the Union within the six month period applicable to this case.

(A) Mr. Chandler's handling of the grievance concerning the restriction upon Mr. McCollum requiring him to purchase his stamps at the Rome Post Office. Mr. Chandler's decision not to go forward with this claim was based upon a reasonable interpretation of Postal Service regulations. Mr. McCollum cited no collective bargaining provision to the contrary. This regulation is uniformly applied to all rural carriers throughout the United States and has not been discriminatorily applied to Mr. McCollum. Why Mr. McCollum decided to purchase his stamps at his father's post office in Armuchee need not be resolved. The fact is, Mr. McCollum was ordered to stop doing so, the order did not threaten his immediate health or safety, the order was founded upon a proper Postal Service regulation, and Mr. McCollum was bound to comply, regardless of his personal feelings.

(B) On October 8, 1982 Mr. McCollum recommended his sister for employment as his Rural Carrier Relief, and thereafter filed a grievance when the Postal Service rejected his recommendation as a violation of its nepotism rules. Because Mr. McCollum's recommendation is tantamount to appointment under applicable Postal Service regulations, that renders him a managing official and thus he is forbidden from appointing a relative. Mr. Chandler initially agreed with Mr. McCollum's position. After further investigation, including a study of the article published by the Association in its nationally circulated magazine, Mr. Chandler concluded otherwise and did not proceed with the grievance. His decision not to go forward with the grievance was based upon a reasonable interpretation of the information available to him. His reliance upon the magazine article was proper. His interpretation conforms to a correct interpretation of the Postal Service regulation, which is being uniformly applied to all rural carriers throughout the United States in the appointment of their relief employees. There is no other evidence linking the Association with any of the other claims involving the failure of the Postal Service to employ either Vickie Dorsey or Timothy McCollum.

(C) The third claim involves an alleged Postal Service violation of Mr. McCollum's rights concerning the withholding of certain money from his salary. Mr. McCollum signed the appropriate authorization to allow the deduction from his salary to be made and he failed to provide Mr. Chandler with his pay stubs so that verification of the claim could be established by Mr. Chandler. Tony McCollum owed this money to the Postal Service.

161. Although Tony McCollum and his mother had taped either covertly or openly almost every other conversation that they believed to be important to their accumulation of charges, on the occasion of Tony McCollum's conversation of May 20, 1981 with Jane Green, the family simply gathered by the speaker phone to "witness" the conversation when Tony McCollum called Jane Green.

162. Tony McCollum did not follow the rule that even he acknowledged was proper, "obey orders, then grieve." Instead, he chose

the route of direct confrontation. Tony McCollum well knew that his instructions were not to work on Wednesday and he deliberately disobeyed them. It is immaterial whether he refused or accepted the letter of instructions by certified mail as to his knowledge that he was not to work on Wednesday. The letter of warning of May 21, 1981 was ultimately removed from his file by the exercise on his behalf of legitimate and lawful collective bargaining grievance procedures by the defendant Union.

163. Plaintiff, Timothy D. McCollum, is a male and an applicant for employment at the Rome, Georgia Post Office. In 1979 he took and passed an examination for employment and was placed on a register of persons eligible for employment as substitute rural carriers at the Rome Post Office. Plaintiff's test score placed him among the top 25% of candidates for such position.

164. On his application for employment Timothy McCollum answered no to question 15 as to whether he had any relatives working for the federal government. At that time, his father was Postmaster at Armuchee and his mother and brother were employed as rural carriers in the Rome Post Office. He testified that he answered the question in the negative because he was under the impression that, since the Postal Service had now become an independent agency, it was no longer part of the federal government. Vickie Dorsey, sister of Timothy McCollum answered questions in the same manner as Timothy McCollum.

165. At some time after taking and passing the examination, Timothy McCollum met with the Rome Postmaster, George T. Howard. Timothy McCollum testified that no reference was made to the application or his answers to any of the questions. The Postmaster testified that he showed Timothy McCollum his application, asked if that was his application and his signature, asked if he understood the questions and the statement he signed and if he had answered to the best of his knowledge. Mr. Howard testified that the questions he asked were suggested to him by Sam Dowdy, Director of Employee and Labor Relations, Atlanta Sectional Center. Mr. Dowdy did not testify in the trial herein.

166. On January 3, 1980 Mr. Howard wrote Mr. Dowdy, outlining the questions he had asked and asking for advice on how to proceed.

167. On January 8, 1980, in a letter written by Mr. Dowdy and reviewed by L.E. Hice or vice versa, the Sectional Center Manager replied, suggesting that Mr. Howard call Timothy McCollum and Vickie Dorsey in and ask them specifically why they answered question 15 as they did. In this letter the writer expressed the opinion that the extensive publicity about the Postal Service would lead one to think that the Postal Service is not now a federal agency. The writer further stated that he feels that, after talking with the applicants and getting the applications corrected, Mr. Howard should proceed with considering them for employment "since they are on your register after having properly qualified on the examination." Mr. Howard testified that he did not receive this letter; however, rather than contacting the Atlanta Sectional Center, his first level supervisory office, for a response to his January 3 inquiry, he contacted the Southern Region in Memphis, his third level supervisory office. Mr. Howard testified that he sent the Atlanta Sectional Center a copy of his letter to Memphis although his copy of the letter does not indicate such.

168. A reply from Memphis agreed with Mr. Howard that Timothy McCollum and his sister had falsified their applications and advised Mr. Howard that he could disqualify them from employment. Mr. Howard did so, notifying Timothy McCollum and Vickie Dorsey by letters dated May 5, 1980 that they were disqualified for falsification of their applications. Timothy McCollum appealed his disqualification to the Southern Region which responded with a letter stating that he was medically unsuitable an admitted mistake by the United States Postal Service. The pre-trial order contained a stipulation that this was an error and that Timothy McCollum was not medically disqualified. This was also stipulated at trial.

169. Vickie Dorsey wrote the Postmaster General about her disqualification and received a response stating that her reply to question 15 was obviously a mistake and not deliberate falsification and that she should reapply for the substitute rural carrier register. She did so.

170. Although Timothy McCollum did not specifically reapply as did his sister, he testified that he thought that her restoration to the register would automatically mean his restoration also. As it turned out he had apparently never been removed from the register since his name appeared on numerous hiring worksheets furnished to the Rome Post Office from the Atlanta Sectional Center during the 1980-81 period. Also he received a February 26, 1982 letter from the Atlanta Sectional Center manager letting him know that the substitute rural carrier register he was on was being merged with the regular rural carrier register and giving him an opportunity to remain on the new register.

171. Prior to a July, 1981 contract change establishing Rural Carrier Relief employees, who are noncompetitively hired, substitute rural carriers were normally competitively hired as career employees from a register. In the case of the Rome Post Office the Atlanta Sectional Center would send a hiring worksheet to the Postmaster with three or more names on it listed in order of qualification by examination score.

172. David McCollum, the father of Timothy McCollum and Postmaster at Armuchee, Georgia, testified that Sam Dowdy, Sectional Center Manager, Employee and Labor Relations, told Postmasters they should normally hire from the top of a hiring worksheet. However, if they established a pattern of hiring (whether from the top or not) and broke the pattern, that might constitute evidence of discrimination. Mr. Dowdy further told the Postmasters that they must have a good reason for varying their pattern or for not hiring from the top of a register.

173. Betty Stone, Postmaster of Silver Creek Post Office, testified that she was instructed by U.S. Postal Service officials in Atlanta that she must hire the top person on a hiring worksheet or have a very good explanation for not doing so.

174. On at least one occasion in the past, Mr. Howard has hired from the top of a hiring worksheet. On October 19, 1977 he wrote to Tony McCollum, then on a register of eligibles with a score of 93,

that he had not been selected for a substitute rural carrier position because the applicant with the highest score was hired.

175. Timothy McCollum's name first appeared on a hiring worksheet on March 12, 1980, when his name was third on the list. He also appeared on hiring worksheets dated June 19, 1980 and September 15, 1980. No selection was made from these lists. He again appeared, this time in the No. 1 position, on a January 12, 1981 hiring worksheet. According to the Postmaster's testimony, he sent a call-in notice to Timothy McCollum, and Mr. McCollum did not respond. Mr. McCollum testified that he did not receive such a notice and in fact was never notified that he was on a hiring worksheet. The Postmaster furthr testified that he sent Timothy McCollum a call-in notice because the regulations required it, and he would not have hired him if he had responded.

176. The record also contains a supplemental register dated January 12, 1981 containing eight employees. Timothy McCollum was ranked first. The Postmaster selected a female, Deborah Bohannon, ranked and listed 8th on that register, for a substitute rural carrier position. At trial Mr. Howard explained in detail why those listed above Deborah Bohannon were not hired. Some were males and some were females. Valid reasons were given as to why others above Deborah Bohannon were passed over including the passage by the name of Timothy McCollum because of the falsification of his application and relatives employed in the Rome Post Office.

177. The last substitute rural letter carrier hired before Ms. Bohannon had been Faye Evans, a female, hired in early 1980. At that time two females, Dot Hubbard and Chloe Dollar, who had been hired on an emergency basis rather than off a register, were working as substitute rural carriers, where they remained until becoming Rural Carrier Relief employees after the July, 1981 contract change.

178. Mr. Howard testified to several reasons for not hiring Timothy McCollum:

1. He falsified his application;

2. He was impossible to work with or around;

3. There would have been too many members of one family at one post office;

4. He failed to respond to a call-in notice.

179. The Postmaster testified that there were cases other than the McCollums of relatives working in the Rome Post Office.

180. Timothy McCollum testified that he contacted an EEO counselor when he learned that the Postmaster had asked that another examination for substitute rural carrier be held, even though Timothy McCollum was still on the existing register. Mr. Howard testified that no subsequent examination was given, although he acknowledged that he stated in his deposition that such examination was given.

181. At all material times, plaintiff, Timothy McCollum, has been ready, willing and qualified to begin employment with the Rome Post Office as a Rural Carrier.

182. There is not real evidence that sex played a part in Mr. Howard's decision not to hire Timothy McCollum and at trial he testified that Mr. Howard's decision not to hire him may have been motivated, at least in part, by Mr. Howard's dislike of the McCollum family.

183. Timothy McCollum and his sister, Vickie Dorsey, were treated identically. Each applied for the job at the same time, took the test on the same day, were each interviewed on the same day and were issued identical rejection letters on the same date.

184. Mr. Howard rejected the applicants because he thought it would be improper to the eyes of the public to have four members of the McCollum family working in the same post office in a community the size of Rome, and because they falsified their job applications.

185. Mr. Howard tendered the job for which Timothy McCollum was applying to other males. These did not accept the job because

they wanted full time work and the job at issue was a part time job.

186. Any actions of which Charlene McCollum and Tony McCollum complain in this action do not result from sex and age discrimination nor from reprisal but from the expected and reasonable response of Postal Service Management to acts of insubordination and confrontation by both Charlene McCollum and Tony McCollum.

CONCLUSIONS OF LAW

1. Each plaintiff has the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). A plaintiff who alleges discrimination in conditions of employment, as do plaintiffs, Charlene McCollum and Tony McCollum in this case, makes a prima facie case by showing that she or he is a member of a class entitled to the protection of Title VII and that she or he is treated differently from other persons similiarly situated who are not members of the class. *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864, 865 (6th Cir.1975). Here such plaintiff must show tht sex was a factor influencing the Postmaster's decisions concerning her or him. *Cf. Bibbs v. Block*, 749 F.2d 508 (8th Cir.1984).

2. Stated differently, a plaintiff must produce evidence of disparate treatment from which the trier of fact may infer a causal connection between an adverse action and the alleged basis for discrimination, in this case, sex. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir.1981).

3. Once a plaintiff makes a prima facie case of discrimination, the burden of articulating a legitimate nondiscriminatory reason for defendant's action shifts to defendant. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff retains the burden of persuasion. A plaintiff may succeed in carrying this burden "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *United States Postal Service Board of Governors v. Aidens*, 460 U.S. 711, 716 (1983), quoting *Burdine, supra*.

4. In the instant case, Charlene McCollum is clearly a member of a protected class, a female. She contends she has been treated differently in the two situations of which she complains here, her route reduction and her removal (later changed to a 78 day suspension).

5. In this case plaintiffs, Tony McCollum and Timothy McCollum, white males, are nevertheless protected by Title VII from disparate treatment based on sex because the statute's aim is to assure that members of both sexes are treated alike in employment situations. *Phillips v. Martin Marietta Corp.* 400 U.S. 542 (1971). Its protection is extended to both sexes, 42 U.S.C.A. §2000e-16(a) (1981).

6. The burden of proof standards of *McDonnell Douglas, supra,* also apply, in a modified form, to the retaliation claim of the plaintiff Tony McCollum. He may establish a prima facie case under 42 U.S.C.A. 200e-3 (1981) by showing that:

> 1. Plaintiff engaged in action in opposition to Title VII discrimination or participated in a Title VII proceeding, which action or participation was known to defendant;
>
> 2. Plaintiff suffered adverse employment action subsequent to the action or participation;
>
> 3. There is evidence of a causal connection between the underlying protected act and the retaliatory action. *Slotkin v. Human Development Corporation of Metropolitan St. Louis,* 454 F. Supp. 250 (E.D. Mo.1978).

7. One of the ways to show a connection between a protected act and a retaliatory action is to show the retaliatory action "followed the protected activity so closely as to justify an inference of retaliatory motive." *Womack v. Munson,* 619 F.2d 1292, 1296, n. 6 (8th Cir.1980). See also to the same effect *McCarthy v. Cortland County Community Action Program,* 487 F. Supp. 333 (N.D.N.Y.1980).

8. Once a plaintiff proves a prima facie case of retaliation, the burden shifts to defendant to articulate a legitimate nondiscriminatory

reason for his action; that is, to come forward with "evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason." *Womack, supra,* at 1296.

9. The standards of proof set out in *McDonnell Douglas, supra,* apply, with appropriate modification, to the claims made by Timothy McCollum. Plaintiff, Timothy McCollum, must show that

a. he belongs to a protected group;

b. he applied for and was qualified for a job for which the employer was seeking applications;

c. he was not selected;

d. after his nonselection, a person of the opposite sex was selected for the position.

10. Plaintiff, Timothy McCollum, must show that sex was a factor influencing the Postmaster's decisions concerning him. *Bibbs v. Block,* 749 F.2d 508 (8th Cir.1984).

11. In order to recover in her action instituted under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), plaintiff, Charlene McCollum is required to prove that the Postal Service intentionally discriminated against her on the basis of her sex or age. 42 U.S.C.A. § 2000e-16(c) (1981); 29 U.S.C.A. § 633a(1975); *Texas Department of Community Affairs v. Burdine, supra; Gilchrist v. Bolger,* 733 F.2d 1551, 1553 (11th Cir.1984); *Palmer v. District Board of Trustees of St. Petersburg Junior College,* 748 F.2d 595, 599 (11th Cir.1984).

12. Plaintiffs, Timothy McCollum and Tony McCollum, in order to recover, are required to prove that the Postal Service treated them as it did because they are males. 42 U.S.C.A. § 2000e-16(c) (1981). *Gilchrist,* 733 F.2d at 1553. Tony McCollum can also prevail upon convincing the Court that his treatment was retaliation for his involvement in the Equal Employment Opportunity (EEO) process. 42 U.S.C.A. § 2000e-5(f)(1) (1981). *Canino v. United States Equal Employ-*

ment Opportunity Commission, 707 F.2d 468, 471 (11th Cir.1983).

13. In the case of each plaintiff, the "critical" issue is the Postal Service's motive for its actions. *Teamsters v. United States*, 431 U.S. 324, 335-336 n. 15 (1976); *Clark v. Huntsville City Board of Education*, 717 F.2d 525, 529 (11th Cir.1983). This "critical" issue is one of fact, to be determined by this Court as are "other ultimate questions of fact." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Nix v. WLCY Radio*, 738 F.2d 1181, 1185 (11th Cir.1984).

14. Personal discord, while unfortunate, is not discrimination prohibited by Title VII or the ADEA. *Nix v. WLCY Radio, supra*; *Bohrer v. Hanes Corporation*, 715 F.2d 213, 219 (5th Cir.1983), *cert. denied*, 104 S.Ct. 1284 (1984).

15. While it is clear that Title VII and the ADEA prohibit discrimination, it is equally settled that an employer may take action against an employee "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio, supra*.

16. In discrimination actions such as these, it is not the province of this Court to determine whether an employment policy is "good" of "bad," or even whether that "policy [is] prohibited under other laws . . ." *Gilchrist v. Bolger, supra*.

17. Even when an employer violates its own rules, it does not follow that the action challenged flowed from a discriminatory intent. *Clark v. Huntsville City Board of Education, supra*. Rather, the plaintiff must prove that the employer departed from its rules because the employer intended to discriminate against the plaintiff. *Id.* at 528. Finally, "a simple finding that the defendant did not truly rely on its proffered reasons, without a further finding that the defendant relied instead on race, [age, sex or participation in EEO activities], will not suffice to establish Title VII [or ADEA] libility." *Id.* at 529. *See also*, Nix, 738 F.2d at 1184-1185.

18. Charlene McCollum challenges two actions taken by the

Postal Service; (1) the March 23, 1981 issuance of a notice removing her from the Postal Service; and (2) the reduction of her route in 1981. Mrs. McCollum alleges that she was issued the notice of removal because of her age and sex.

19. In order to establish a prima facie case of age discrimination, Mrs. McCollum was required to prove that she was: (1) within the statutorily protected age group; (2) that the Postal Service sought to replace her with a younger person and (3) that she was replaced with a younger person outside the protected class. *Pace v. Southern Railway System*, 701 F.2d 1383, 1386 n. 7 (11th Cir.). *cert. denied*, 104 S.Ct. 549 (1983). As an alternative to the third prong listed above, Mrs. McCollum could have produced evidence that Postmaster Howard had engaged in a pattern or practice of replacing older employees with younger ones. *Id.* at 1387.

20. The Court finds that Mrs. McCollum failed to prove a prima facie case of age discrimination as she produced no evidence tending to prove that the Postal Service sought to replace her with a younger person, or that Postmaster Howard had a pattern or practice of replacing older employees with younger ones.

21. While Tony McCollum, Mrs. McCollum's son and a plaintiff in his own right, temporarily replaced Mrs. McCollum, it is clear to the Court that he was not sought by Postmaster Howard as Mrs. McCollum's replacement. Given the bad feelings between Postmaster Howard and the McCollum family, the Court concludes that Postmaster Howard allowed Tony McCollum to temporarily replace his mother only because Tony was familiar with her route. Mrs. McCollum's age claim does not rise to a prima facie case merely because the Postal Service coincidentally chose a temporary replacement younger than she. *See Palmer v. District Board of Trustees of St. Petersburg Junior College*, 748 F.2d 595, 599-600 (11th Cir.1984). She was required to prove not just that age was a factor in her removal, but that it was the "determining factor" which caused Postmaster Howard to act as he did. *See Loeb v. Textron*, 600 F.2d 1003, 1019 (1st Cir.1979) Age was not a factor at all in the replacement of Mrs. McCollum.

22. With regard to the removal (later changed to a 78 day suspension) of Charlene McCollum, a comparison of her treatment with that of male employees both at other post offices in the Atlanta Sectional Center area and at the Rome Post Office reveals harsher treatment for her than for male employees. There was no pretense of progressive discipline where plaintiff was concerned. Considering the punishment of plaintiff to be a 78 day suspension, as it ultimately was, rather than a removal, such a penalty is more harsh when compared to treatment given to male Postal Service employees at the Rome Post Office.

23. The Postal Service regulations for providing relief for overburdened rural routes provide that "attempts should be made to transfer territory to other rural routes at the office, provided that this does not result in overburdening the other routes."

24. With regard to converting rural route delivery to city delivery as was done in Charlene McCollum's case, the Postal Service handbook further provides that "As a general rule, conversion from rural to city delivery should be considered only to:

> a. provide relief for overburdened rural routes when all other alternatives are impractical. Section 822.41.

25. The handbook also states: ". . . the fact that a given area is fully developed and adjacent to city delivery does not, of itself, constitute sufficient justification for conversion."

26. The handbook is specific in requiring consultation with the rural carrier affected and states:

> "When preparing a change on other than a vacant route, the regular rural carrier must be consulted and given an opportunity to comment or submit a written statement." and,

according to Section 824.2a of the handbook the comments of a rural carier "will be considered before a final decision is reached."

27. Charlene McCollum was not consulted in advance and her

views on the route reduction were not sought.

28. Before the route evaluation, the routes of both Charlene McCollum and a male carrier, Henry G. Walker, were K47, with almost identical evaluation factors (56.33 for plaintiff, 56:29 for Mr. Walker). The minimum relief requirements were identical for each route, two and one half hours.

29. After evaluation Mr. Walker's route was rated K46 and plaintifff's initially K43, later changed to K45.

30. Although the box factor and mileage on plaintiff's route were greater than those on Mr. Walker's route, her salary after evaluation was slightly less. Her salary was also less than that of four male rural carriers, all with box factors and mileage, the factors on which a rural carrier's pay depends, less than hers.

31. Mrs. McCollum can establish a prima facie case of sex discrimination in her removal by proving that she: (a) is a member of a protected class; (b) was qualified for the position at issue; (c) was discharged and replaced by a male or was discharged while a male with equal or lesser qualifications was retained. *See Thompkins v. Morris Brown College*, 752 F.2d 558, 562 (11th Cir.1985). Mrs. McCollum did not prove that she was replaced by a male. While Tony McCollum carried her route, his assignment was only temporary. Moreover, there was no intent on the part of Postmaster Howard to favor Tony McCollum, a male.

32. Even if the disparate disciplinary treatment of Mrs. McCollum rises to a prima facie case of sex discrimination, Postmaster Howard has advanced a legitimate nondiscriminatory reason for Mrs. McCollum's removal from her job, i.e., her failure to follow instructions.

33. Mrs. McCollum has failed to prove that her rural route reduction was the product of sex discrimination. Mrs. McCollum bases this part of her case on the fact that another rural letter carrier, who happened to be a male, received an evaluation when his route was reduced which entitled him to approximately fifteen dollars more per

week than Mrs. McCollum received. This is insufficient to state a prima facie case of discrimination. *See Palmer*, 748 F.2d at 599. She also contends four other male carriers at the Rome Post Office earn more than she. Mrs. McCollum concedes that under the Postal Service's national guidelines, her route was "overburdened" and in need of adjustment. She concedes that her route, along with the male carrier's route, was readjusted. Such circumstances do not raise an inference that discriminatory reasons caused Mrs. McCollum's removal. *See, Texas Department of Community Affairs v. Burdine, supra.*

34. Even if a prima facie case has been made by Mrs. McCollum as to her route reduction and her decrease in pay, the Court finds that it was rebutted, since the Court credits the testimony of John King and Joe Emerson that Mrs. McCollum's route was reduced in a logical manner. *See, Clark*, 717 F.2d at 529; *Nix*, 738 F.2d at 1187. Furthermore, the Court credits the testimony of Steven Smith that in most post offices, Mrs. McCollum's route would have been reduced to a greater extent than it was. There is no evidence Mrs. McCollum drew less than she was entitled to based upon her route after it was reduced in an entirely proper manner.

35. The issue before this Court is not whether, in fact, Mrs. McCollum committed the offenses charged in her notice of removal. *See Nix*, 738 F.2d at 1187; *Clark*, 717 F.2d at 529. Rather this Court is responsible for determining whether the charges were motivated by bias against Mrs. McCollum because of her age or sex. *Id.* The Court has found that Mrs. McCollum disagreed with her superiors as to how her job should be performed. The Court has further found that Postmaster Howard's refusal to hire Mrs. McCollum's children fueled the personality conflicts in this case and caused Mrs. McCollum to write her April 10, 1980 letter to former Postmaster General Bolger, which in turn, further angered Postmaster Howard. Such personality conflicts have nothing to do with discrimination. *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369, 371 (5th Cir.1980).

36. Tony McCollum contends that he was mistreated because of his sex and in retaliation for representing his mother in the EEO process. Tony McCollum contends that he was improperly issued a

letter of warning on May 23, 1981, and further, was not allowed overtime compensation and two-day weekends when deprived of Saturday as his relief day.

37. According to the Postal Service Manual, in effect at the time of the assignment of the substitute to Tony McCollum in 1981, "when relief days are authorized on heavy duty routes, they should be granted on Saturday unless another day is desired by the carrier and is mutually agreeable to the postmaster and carrier." There was testimony to the effect that this regulation applies only to regular carriers and not to substitutes carrying vacant routes on a full time basis.

38. Tony McCollum has shown that he participated in the Title VII proceeding, representing his mother in two discrimination complaints. He has also shown adverse employment action subsequent to the participation. The alleged retaliatory action followed the protected activity, which occurred from March 25, 1981. He received a letter of warning on May 2, 1981.

39. While there may be some conflict in the evidence as to whether the Postmaster knew of Tony McCollum's representation of his mother at the time of the letter of warning on May 2, 1981 and the assignment of a substitute to Tony McCollum, the Court concludes and finds from the weight of the evidence that Postmaster Howard did not know of Tony McCollum's representation of his mother.

40. In order to establish such a prima facie case of prohibited retaliation Tony McCollum was required to prove that: "(1) . . . there was a statutorily protected participation, (2) . . . an adverse employment action occurred, and (3) . . . there was a causal link between the participation and the adverse employment action." *See Canino v. United States Equal Employment Opportunity Commission*, 707 F.2d 468, 470 (11th Cir.1983); *Whatley v. Metropolitan Area Atlanta Rapid Transit Authority*, 632 F.2d 1325, 1328 (5th Cir., United B, 1980). Plaintiff, Tony McCollum failed to establish the requisite "causal link." Tony McCollum admitted that his problems with Postmaster Howard related back to 1978, when he received a letter of warning for losing a cer-

tified letter. Tony McCollum was not involved in the EEO process until March 1981, when he represented his mother during her administrative challenge of her removal. The problems between Postmaster Howard and Tony McCollum began three years prior to any EEO activity by the plaintiff; consequently, a prima facie case of retaliation is not stated.

41. Tony McCollum claims he was not assigned a substitute to relieve him on Saturdays because he is a male. In order to establish a prima facie case, Tony McCollum is required to prove, among other things, that he was "similarly situated with [a female employee], but . . . was denied a condition of employment afforded that [female employee]." *Thompkins v. Morris Brown College*, 752 F.2d 558, 562 n.7 (11th Cir.1985). The two female employees situated most similarly to plaintiff were June Moyer and Dorothy Hubbard. Like the plaintiff, each of these women were substitute rural carriers temporarily assigned to "vacant" routes until permanent full time carriers could be found. Each of these women were ultimately assigned substitutes. Tony McCollum has failed to prove that he was discriminatorily assigned a substitute and thereby deprived of an opportunity to earn overtime compensation.

42. It is not clear whether Ms. Moyer and Ms. Hubbard were assigned substitutes who worked on Saturdays; therefore, plaintiff may have established a prima facie case on the "Saturday" issue. The Postal Service rebutted this prima facie case by demonstrating that it was the Postal Service's policy to hold down overtime costs and that Jane Green was assigned as plaintiff's substitute because she had previously delivered his route and was therefore familiar with it. Ms. Green, at the time she was assigned as plaintiff's substitute, was already delivering another route on Saturday, and therefore, could not relieve plaintiff on that day of the week. The Postal Service more than satisfied its obligation to "articulate some legitimate, nondiscriminatory reason" for its challenged action. *McDonnell Douglas Corp. v. Green*, *supra*; *Smith v. State of Georgia*, 749 F.2d 683, 687 (1985).

43. Tony McCollum failed to prove a prima facie case of discrimination arising from the May 23, 1981 issuance to him of a let-

ter of warning. Absent direct proof of discrimination, a male employee fails to establish a prima facie case of discrimination unless he can point to a similarly situated female who has received better treatment than he. *Nix*, 738 F.2d at 1186-1187. Such proof is totally lacking in this case. As did Mrs. McCollum, Tony McCollum spent much time and effort at trial challenging the merits of the letter of warning issued to him on May 21, 1981. The issue of pretext, or whether the challenged action occurred for the employer's stated reason, is not before the Court unless the plaintiff states a prima facie case. *Nix*, 738 F.2d at 1187; *Clark*, 717 F.2d at 529. Tony McCollum failed to adduce any evidence that women were treated better than he was. Consequently, the merits of the charges are irrelevant.

44. Timothy McCollum failed to establish a prima facie case of sex discrimination in challenging Postmaster Howard's refusal to hire him. In a Title VII case, a plaintiff establishes a prima facie case when he proves "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criteria illegal under the Act." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978). While it is true that the plaintiff was not hired while a woman was, it is equally true that the plaintiff's sister, Vickie Dorsey, was treated identically with the plaintiff and also was not hired. Plaintiff and Ms. Dorsey took the same test, received grades differing by only two points, were both interviewed in December 1979, were both viewed as falsifyng their employment applications, and received identical rejection letters from Postmaster Howard.

45. In March 1981, when Postmaster Howard hired a woman instead of plaintiff, Timothy McCollum, the Postmaster first offered the position to three men, all of whom declined because they were not interested in the part-time work offered. Mindful of the Eleventh Circuit's direction in *Palmer v. District Board of Trustees of St. Petersburg Junior College*, 748 F.2d 595, 599 (11th Cir.1984), that the "prima facie formula" not be applied mechanically, the Court concludes that Timothy McCollum failed to establish a prima facie case of sex discrimination. *See also, United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

46. Even if a prima facie case were proven by Timothy McCollum, the Postal Service amply rebutted such an initial showing. In the latter part of 1979, Postmaster Howard concluded that hiring plaintiff and his sister, Ms. Dorsey, would produce the appearance of impropriety because three members of the McCollum family already worked for the Postal Service locally, and further, because it might appear that plaintiff and Ms. Dorsey were hired as a product of the friendship among Postmaster Howard and Mr. and Mrs. McCollum. This belief was honestly held by Postmaster Howard. Consequently, it satisfies the Postal Service's burden to articulate a non-discriminatory motive. *See, e.g., Nix*, 738 F.2d at 1187; *Clark*, 717 F.2d at 529.

47. In March 1981, when Postmaster Howard last considered the plaintiff, Timothy McCollum, for employment, plaintiff's mother, Mrs. Charlene McCollum, was issued a notice of removal. Plaintiff's sister, Vickie Dorsey accosted Postmaster Howard in his office, yelling and swearing at him. With such personal discord between Postmaster Howard on the one hand, and the McCollum family on the other, Postmaster Howard could not be faulted if his personal dislike for his personal dislike for the family influenced his employment decision. *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369, 371 (5th Cir. 1980). Indeed, plaintiff, Timothy McCollum, stated that the Postmaster's dislike for plaintiff's family was at least a factor which influenced Postmaster Howard in not hiring Timothy McCollum.

48. The District Court is charged with determining the "ultimate question of fact" in a Title VII case in the same manner as other questions of fact. *United States Postal Service Board of Governors v. Aikens, supra.* Mrs. McCollum claims that in early 1981 she was removed because of her age and because she is a female. Tony McCollum claims that he was mistreated because of his youth and because he is a male. He was twenty-four at the time of the challenged incidents. Timothy McCollum contends that he was ill-treated because of his sex, while admitting that Postmaster Howard refused to hire him, in part, because the Postmaster did not get along with the McCollum family. Vickie Dorsey attempted to file an administrative complaint of sex discrimination, but tesified that she was mistaken and had actually intended to file an age complaint; Ms. Dorsey, according to her application has

a birth date of November 4, 1954.

49. Postmaster Howard failed to hire Timothy McCollum, not because he was a male, but because he did not want another member of the McCollum family working for him at the Rome Post Office.

50. Postmaster Howard has advanced legitimate non-discriminatory reasons for each action taken by him of which the various plaintiffs complain in their respective actions.

51. As postal employees, Charlene McCollum and Tony McCollum have no cause of action against the United States Postal Service or individual Postal Service supervisors for improper treatment. Neither of these plaintiffs has a cause of action against the Postmaster General unless such treatment is based on prohibited discrimination.

52. The only recourse of Charlene McCollum and Tony McCollum for redress for improper treatment based on causes other than prohibited discrimination is utilization of the grievance system provided by the National Agreement between the Postal Service and the National Rural Letter Carriers Association. As a rural carrier employed by the Postal Service, Charlene McCollum and Tony McCollum are each entitled to the protection of such system, whether or not she or he is a member of the Union. The Union has the right to exclusive control over grievances beyond Step One of the grievance process.

53. Plaintiffs correctly assert that the Union has a duty to represent her or him in employment matters involving the Postal Service. Therefore the Union cannot arbitrarily refuse to process a meritorious grievance nor can it handle it perfunctorily. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167 (5th Cir.1971).

54. This is not to say that the Union is required invariably to agree with employees or to blindly pursue matters merely because an employee wishes to do so. Yet, if the Union's refusal to represent an employee or pursue a grievance is arbitrary, discriminatory, in bad

faith or influenced by hostility toward the employee, the Union has breached its duty of fair representation. *Freeman v. O'Neal Steel, Inc.*, 609 F.2d 1123 (5th Cir.1980); *Cox v. C.H. Masland and Sons, Inc.*, 607 F.2d 138 (5th Cir.1979).

55. In an action such as this, alleging both a violation of the duty of fair representation against a union and a breach of contract against the employer, plaintiffs may prevail only if they can establish both a breach of the duty and a violation of the collective bargaining agreement. *See Foster v. United Steelworkers of America, Local Union No. 13600*, 752 F.2d 1533 (8th Cir.1985). *See also, Vica v. Sipes, supra; Graf v. Elgin, J. & E. Ry. Co.*, 697 F.2d 771 (7th Cir.1982); *Harris v. Schwerman Trucking*, 668 F.2d 1204 (11th Cir.1982). Neither has been established, either by Charlene McCollum or by Tony McCollum.

56. Charlene McCollum's claim of harassment in the car-denting incident does not state a violation of the collective bargaining agreement which creates this duty under the circumstances presented here. In the absence of a duty, there can be no violation by the Postal Service. Accordingly, Mrs. McCollum has no valid claim against the National Rural Letter Carriers Association.

57. While there is much evidence of hard feelings toward Mrs. McCollum, there is insufficient evidence that the Postal Service is responsible for it, or that the Postal Service condones it, or that the Postal Service is liable for it.

58. Tony McCollum's stamp-purchase claim does not state a violation of the collective bargaining agreement. Nothing in the collective bargaining agreement has been cited which either limits management's authority in this regard, or which gives the carrier the right to buy the stamps where he chooses. The manual provision stipulates:

> "152.1 Rural carriers are required to maintain a supplyof stamp stock sufficient to meet the needs of the route. An adequate quantity of postage stamp fixed credits will be issued to you unless you prefer to purchase an adequate amount of stock with personal funds.

> 152.2 Fixed credits are issued and replenished at the originating headout office. If you serve an intermediate office, replenish a portion of your fixed credit (equal to the stamps sold to customers of that office) at the intermediate office."

A reasonable construction of these provisions would allow their application to stamp purchases from personal funds. Without more, the Court cannot conclude that the Postal Service violated the collective bargaining agreement in restricting Mr. McCollum to obtaining his stamps at the Rome Post Office.

59. For Tony McCollum to prevail on his claims involving his recommendation of his sister as a violation of the collective bargaining agreement, he must show that the contract prevails over the nepotism law. The contract does not prevail. The contract provides in Article 19 as follows:

> "Section 1. Statement of Principle
>
> Those part of all handbooks, manuals, and published regulations of the Postal Servic, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions."

This means that the nepotism law governs, because there is nothing in the contract to the opposite effect. Accordingly, Tony McCollum was bound by the nepotism law. He was barred from recommending his sister as his relief employee and no violation of the contract is stated on this claim.

60. On the Tony McCollum claim for the withholding of salary, he has failed to offer any legal basis to establish this as a contract

violation.

61. The National Rural Letter Carriers Association did not violate its duty of fair representation toward either Charlene McCollum or Tony McCollum. It handled each grievance in a non-discriminatory way, free of improper motive, and in good faith. Each action taken was based solely on the lack of merit to the grievances, and was not taken because of any animosity toward the McCollums.

62. The National Rural Letter Carriers Association has the clear right to sift grievances and identify the meritorious and segregate them from the frivolous ones. So long as this exercise is not performed in an arbitrary, capricious or bad faith manner, it is not in violation of the duty of fair representation for the Association to refuse to process such grievances. *Vaca v. Sips, supra*; *Cox v. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir.1979); *Freeland v. O'Neal Steel, Inc.*, 609 F.2d 1123 (5th Cir.1979); and *Harris v. Chemical Leaman Tank Lines, Inc., supra.*

63. Neither plaintiff has carried the burden of persuasion upon the issues before the Court made by the claims of the various plaintiffs.

ACCORDINGLY, judgment shall be entered in favor of the defendant, William F. Bolger, Postmaster General, as to the claims made by each plaintiff and in favor of the defendant, National Rural Letter Carriers Association, as to the claims made against the Association by plaintiffs, Charlene McCollum and Tony McCollum; and, the plaintiffs' claims are DISMISSED.

IT IS SO ORDERED, this the 26th day of July, 1985.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8680

D.C. Docket No. 83-170

CHARLENE McCOLLUM,

Plaintiff-Appellant,

versus

WILLIAM F. BOLGER, ET AL.,

Defendants-Appellees.

No. 85-8681

D.C. Docket No. 83-279

TONY D. McCOLLUM,

Plaintiff-Appellant,

versus

WILLIAM F. BOLGER, POSTMASTER GENERAL AND NATIONAL RURAL LETTER CARRIERS ASSOCIATION,

Defendants-Appellees.

No. 85-8682

D.C. Docket No. 85-95

TIMOTHY D. McCOLLUM,

Plaintiff–Appellant,

versus

WILLIAM F. BOLGER,
POSTMASTER GENERAL,

Defendant-Appellee.

Before CLARK, Circuit Judge, HENDERSON*,
and WISDOM**, Senior Circuit Judges.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby, AFFIRMED:

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

*See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth
Circuit, sitting by designation.

ENTERED: July 23, 1986
FOR THE COURT: Miguel J. Cortez, Clerk

By: *s/Karleen McNabb*
Deputy Clerk

ISSUED AS MANDATE: Aug. 14, 1986